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In the Supreme Court of the United States

OCTOBER TERM, 1950

OSWALD POHL, ERICH NAUMANN, GEORG SCHALLERMAIR, PAUL BLOBEL, WERNER BRAUNE, OTTO OHLENDORF AND HANS TH. SCHMIDT, PETITIONERS,

vs.

DEAN ACHESON, SECRETARY OF STATE, SECRETARY OF DEFENSE, GEORGE C. MARSHALL, SECRETARY OF THE ARMY, FRANK PACE, ATTORNEY GENERAL, J. HOWARD MCGRATH, JUDGE ADVOCATE GENERAL, THOMAS H. GREEN, PROVOST MARSHAL, JOHN DOE, HIGH COMMISSIONER, JOHN J. MCCLOY, COMMANDING GENERAL OF THE EUROPEAN COMMAND, THOMAS HANDY, COLONEL W. R. GRAHAM, AS PRISON OFFICER OF WAR CRIMES PRISON NO. 1 AT LANDSBERG, GERMANY, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND MOTION TO DISPENSE WITH PRINTING OF RECORD.

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MARCH 28, 1951.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioners, Oswald Pohl, Erich Naumann, Georg Schallermair, Paul Blobel, Werner Braune, Otto Ohlendorf and Hans Th. Schmidt, respectfully pray that a Writ of Certiorari issue to review the summary decision and judgment of the United States Court of Appeals for the District of Columbia Circuit entered February 19, 1951 consolidating

seven separate appeals of petitioners and summarily affirming summary judgments of dismissal of petitioners' Petitions for Writs of Habeas Corpus filed against respondents in the United States District Court for the District of Columbia.

The Opinion Below

The United States District Court for the District of Columbia summarily dismissed each Petition without opinion. The opinion of the United States Court of Appeals for the District of Columbia Circuit is included in paragraph designated (2) of its Order of February 19, 1951 and is not reported (R. 154).[1]

Jurisdiction

On February 12, 1951 petitioners each filed in proper person a Petition for Writ of Habeas Corpus in the United States District Court for the District of Columbia attacking the validity of death sentences imposed upon them by U. S. Military Tribunals in Germany. Being confined in an American Military prison in Germany, they were unable to obtain counsel in the United States prior to the filing of their petitions. Present counsel was retained on February 14, 1951. The Judgments of Dismissal of the United States District Court for the District of Columbia were entered February 13, 1951 (R. 51, 65, 77, 90, 103, 116, 142). On February 14 each petitioner filed a Notice of Appeal with the Clerk of the United States District Court for the District of Columbia (R. 52, 66, 78, 91, 104, 117, 143). On February 15, 1951 respondents filed a single Motion to Consolidate the appeals noted by petitioners on February 14 and a separate Motion to Dismiss or Affirm petitioners'

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[1] R. refers to the record on appeal filed by the Clerk of the United States District Court of Appeals for the District of Columbia with this Court.

appeals (R. 146, 148). Preliminary transcripts of the record were filed by respondents in the Court of Appeals on February 15, 1951. On February 16, 1951 respondents moved for an immediate hearing of their Motions filed the preceding day (R. 151). The Court of Appeals did not sit on February 17 and February 18, as these days were respectively Saturday and Sunday. On February 19, 1951, on returning from a hearing before one of the courts of the District of Columbia, counsel for petitioners was ordered by telephone to appear before the Court of Appeals at two o'clock that afternoon in these cases. On February 19, 1951, (R. 154) over the strenuous objections and protests of counsel for petitioners,[2] the Court of Appeals summarily consolidated the seven appeals docketed by petitioners, even though five of the Petitions involved proceedings at Nurnberg and two proceedings at Dachau under different procedures, and affirmed the summary judgments of dismissal of the District Court on the authority of "*Johnson* v. *Eisentrager*, 339 U. S. 763 and *Flick* v. *Johnson*, 85 U. S. App. D. C. 70, 174 F. (2d) 983, Cert. Den. 338 U. S. 879." By its Order of February 19, the court below ordered its Mandate to issue February 23, in which period a holiday, February 22nd, intervened (R. 155). On February 21, 1951, petitioners filed a Motion for a Stay of the Mandate of the Court of Appeals pending the filing of an application for certiorari with this Court. This Motion was orally heard on February 19 by the Chief Justice of this Honorable Court. At this argument respondents agreed through their counsel that the executions of petitioners, all of whom had been condemned to death, would be stayed pending the determination by this Honorable Court of petitioners' application for certiorari. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as

[2] Transcript of Proceedings, Court of Appeals, February 19, 1951, pp. 5-7, 15, 17, 18.

amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. 347).

Summary Statement

This consolidated case presents for correction errors of the United States District Court for the District of Columbia, erroneously affirmed by the United States Court of Appeals for the District of Columbia Circuit. The case is one of importance, involves the lives of seven persons and presents important questions of first impression which should be decided by this Court in the public interest and in the political interest of the United States. Petitioners, Oswald Pohl, Erich Naumann, Paul Blobel, Werner Braune and Otto Ohlendorf were tried before two United States Military Tribunals sitting in Nurnberg, Germany, and created by Ordinance No. 7, promulgated October 18, 1946 by the Zone Commander in the American Zone of Occupation of Occupied Germany (Mil. Gov. Gazette—Germany—U. S. Zone Issue B., 1 Dec. 1946, page 11). American funds alone financed these prosecutions. Petitioners Pohl, Naumann, Blobel, Braune and Ohlendorf were tried before Tribunals each consisting of three members, all Americans, all designated by the Zone Commander of the American Zone. The Tribunals acting under the direction of the Zone Commander for the American Zone of Germany laid down rules for the prosecution and trial of petitioners and others. Such rules effectively deprived petitioners of a fair and impartial trial and denied them due process of law under the Constitution, Treaties and laws of the United States. Each of these petitioners was a German national at the time they were charged with having committed alleged offenses defined as "war crimes" in a unilateral ordinance issued by the four Zone Commanders of Occupied Germany and known as Control Council Law No. 10 of December 20, 1945. Each was engaged in military and governmental

operations forming a part of the German war effort. No one of the named petitioners occupied a policy making position under the German Reich during his tenure of office. Each in carrying out the orders and performing the official duties assigned to him had no authority to change the order or to prevent the performance of the duties carried out by that petitioner.

Under the Denazification Law enacted for the American Zone of Occupied Germany petitioners, before any charges of wrong doing had been established against them in any German court, occupation court or other forum, were effectively deprived of their rights to defend themselves against the charges brought against them at Nurnberg. Under Denazification procedures, each petitioner because of his rank in Germany fell into a "class" which made pre-trial punishment of petitioners "automatic." Thus, these petitioners were arrested and incarcerated before trial even before charges were lodged against them. They were subjected to long periods of interrogation by numerous investigators of the Occupying Powers. During these interrogations they were denied counsel. They were denied rights of consultation and confrontation. Upon being "automatically" arrested, all of petitioners' assets and property were "blocked." This meant that petitioners were deprived of their own assets and property to expend in the defense of their lives. Under the procedures adopted at Nurnberg, the right to counsel "was satisfied" by the retention of counsel authorized to practise law in the residence of each petitioner (or counsel appointed specially by the Tribunal). The operation of this principle prevented petitioners from having American counsel representing them in their trials. Even had they been able to obtain American defense counsel with the approval of the Tribunals, such counsel could not be paid as all of the petitioners' assets and property were "blocked." Such compensation as was authorized

German defense counsel was obtained by a levy upon the German people and each petitioner was allocated a fixed and definite sum a month for his defense approximating several thousand marks. Petitioners, of course, were forbidden under penalty of Military Government Law to own or use any foreign currency, including currency of the United States. This effectively prevented the retention of American counsel.

Indictments lodged against these petitioners at Nurnberg were signed only by the Chief of Prosecution for War Crimes of the United States, were never agreed to by other Occupying Powers and were brought in the name of the United States. No crimes as defined by the Constitution, treaties and laws of the United States were charged to these petitioners. Petitioners were charged with so-called war crimes, crimes against peace and crimes against humanity. These crimes did not come into existence until after hostilities ended and were first described as "crimes" in the Moscow Declaration of October 30, 1943 (9 U. S. Department of State Bulletin 310), the London Agreement and Charter issued pursuant thereto of August 8, 1945 (13 U. S. Department of State Bulletin 222) and in Control Council Law No. 10 of December 20, 1945 (15 U. S. Department of State Bulletin 862, 1946).

The indictments were inflammatory and in effect charged each petitioner with almost every so-called "war crime" and atrocity committed by Hitler's Reich. While much has been written in the hysteria of World War II and the period following it, to establish these so-called "war crimes" as known violations of International Law, no satisfactory statement or argument has been advanced to meet petitioners' challenges that the so-called crimes of which they were convicted were not crimes during World War II and became crimes only by "ex post facto" enactments of the victorious Powers. Petitioners were tried under general-

ized charges in an atmosphere of hysteria. Inflammatory arguments were made against petitioners and all conceptions of the rules of evidence as we understand them under the Anglo Saxon method of trials of capital crimes were abolished. The regulations enacted by the Tribunals at Nurnberg controlling the admission of evidence in the cases involving petitioners authorized the Tribunals to receive any evidence which the Tribunals considered had probative value and specifically authorized the receipt in evidence against petitioners of hearsay evidence such as interrogations of any persons, affidavits, letters, diaries, any official document of the victorious Powers and similar inadmissible substitutes for evidence.

While adequate transportation and communication facilities were afforded the prosecution, the use of these facilities by the petitioners and defense counsel were restricted. Thus, in the defense sector for hundreds of defense counsel only two telephones were available for their use. Each prosecutor, on the other hand, had at least one and as many as two and three telephones, with adequate staffs at their command. Petitioners' counsel, with the limited funds at their command, could hardly afford a secretary and an assistant. In addition, all communications of petitioners and their counsel had to pass through officers of the United States. This meant that no confidential communications could be sent out making inquiries of prospective witnesses, as experience showed that when such inquiries were sent, the names of the prospective witnesses came into the possession of the prosecution. Under authorized procedures the prosecution could immediately arrest such witnesses, and in many cases did so, and confined such witnesses while the prosecution interrogated them.

Such practices effectively deprived petitioners of a real opportunity to assemble evidence in their own defense. In

addition, 90% of the evidence used against all of the petitioners was so-called documentary evidence. This evidence consisted of captured German documents and private papers. This captured material was under the control of the victorious allies and was not available to petitioners. The prosecution spent years studying tons of captured German documents and offered in evidence only evidence which they considered would aid the prosecution's case. As petitioners had no access and no staffs with which to make a search for the documents which they needed in their defense, they were deprived of German documents and papers which would have aided them.

Of course, it goes without saying that Allied documents were never available to any of the petitioners for use in their defense. Thus, to illustrate in the "no quarter" war which was carried on in Russia between the Germans and the Russians, no Russian orders and papers were available to show who was responsible for the original instigation of the conduct of such warfare. This deprived petitioners of that field of defense left open to them in the original judgment of the International Military Tribunal on which sat representatives of the Four Victorious Powers and which tried the highest ranking members of Hitler's Reich. The "IMT" case held that if it could be shown by competent evidence that the Allied Powers issued military orders in violation of the Geneva Convention first, then similar orders issued later by Hitler's Reich could not be used as a basis of convictions. This is amply illustrated by the acquittal of Admirals Raeder and Doenitz for giving orders for unrestricted submarine warfare, when it was shown that both the United States and Great Britain had issued such orders to their Naval forces.

While the Manuals of the victorious Powers governing land warfare gave protection to charges of crime against

officers and soldiers who carried out superior orders, by the Nurnberg enactments, petitioners were deprived of this defense. Such a provision existed in the rules of land warfare governing troops of the United States and Great Britain until 1944 and existed in the Manuals of Germany and France during the war. Yet petitioners, notwithstanding that they had no power to change orders or to disobey them, were denied the defense of superior orders, which if violated in time of war would have meant death to petitioners. Moreover, petitioners have even been convicted of alleged crimes which were not even included in the indictments. These general deficiencies in the processes of Nurnberg deprived petitioners of a fair and impartial trial. Nurnberg measured by American standards of justice as we understand them in this country was a clear denial to petitioners of due process of law. Under the allegations of the Petitions here involved these facts could be proven at a hearing on the merits which petitioners should have been afforded below.

Petitioners were denied any opportunity to establish the numerous charges contained in their Petitions by summary dismissals of their Petitions in the District Court and summary affirmance of these dismissals in the Court of Appeals.

The High Commissioner for Germany, Respondent McCloy, did not confirm the death sentences in petitioners' cases until January 31, 1951. The basis for his affirmation will be discussed later and will be shown to be erroneous insofar as each petitioner is concerned. The executions of petitioners were set by respondent McCloy for February 14.

Petitioners Schallemair and Schmidt were not tried at Nurnberg. They were tried by United States Military Tribunals sitting at Dachau. These courts were created by a "Letter of Headquarters, U. S. Forces, European Theater, dated July 16, 1945 (AG 000.2 CAP)." This letter author-

ized trials before United States Military Government Courts of "charges" of "war crimes." Such trials were to be conducted "according to pertinent Military Government directives and instructions."

The reviews of these Dachau cases were confined to military channels.

No written findings and judgments or opinions were entered by the original trial military commissions at Dachau. No issue is presented as to the character of the Dachau courts. They are American. The Dachau proceedings were conducted in an illegal manner. There too the rules of evidence were abolished. Hearsay was the order of the day. Practices similar to those at Nurnberg were freely used.

Respondent Handy by written opinion released January 31, 1951 confirmed the death sentences imposed at Dachau on these two petitioners. Like respondent McCloy, respondent Handy set these two executions for February 14.

This meant that all petitioners had only two weeks within which to prepare and file Petitions for Writs of Habeas Corpus under restrictions of jail confinement in Germany. This period was far too short. Nevertheless, each petitioner succeeded in preparing such a petition and each petition was mailed to, received and filed by the United States District Court for the District of Columbia on February 12. As petitioners had no funds, they were unable to obtain counsel to represent them in the District Court. Notwithstanding that each Petition showed that a sentence of death was to be carried out against each petitioner and that the petitions were filed in proper person and without the petitioners having American counsel to represent them, the District Court took the following amazing hurried actions. It first permitted the petitions to be filed, took jurisdiction thereof and issued a Rule to Show Cause in each case. On February 13, a representa-

tive of the United States Attorney for the District of Columbia appeared before the District Court, made no return to the Rule and orally moved for the discharge of the rule and the dismissal of the seven petitions here involved. (R. 123) The court failed to appoint counsel to present any arguments in support of the petitions, (R. 126, 127) in face of the fact that it was alleged that the actual state of war between the United States and Germany *has ended* and the Federal German Government for Western Germany, operating under the Bonn Constitution, has been established by the United States and its Allies and recognized by them. Without any discussion whatever dealing with the termination of the state of war between the United States and Germany, the District Court summarily discharged the rules it had issued in these seven cases and summarily dismissed the petitions. This meant that the executions of the petitioners would have been carried out on February 14. On February 14 present counsel was authorized to act as counsel for the petitioners. A formal Notice of Appeal was taken on the 14th in each case in view of the imminence of the executions. This fact was made known by cable to High Commissioner McCloy and, of course, to the Solicitor General and the United States Attorney by the immediate service upon them of copies of the Notices of Appeal. The appeals stayed the pending executions.

The summary action of the District Court (R. 122-127) and the haste with which that court proceeded in these cases involving the lives of seven condemned men, deprived them of any semblance of a hearing and of due process of law. It arbitrarily deprived them of any opportunity to amend or supplement their petitions as specifically provided by 28 U. S. C. Sec. 2242.

On February 15 respondents filed in the United States

Court of Appeals for the District of Columbia Circuit a Motion to Consolidate these seven cases and a Motion to Dismiss or Affirm petitioners' appeals. (R. 146, 148) The Rules of the Court of Appeals gave petitioners five days (Rule 31) within which to answer these Motions in writing. On February 16 respondents filed a further Motion for an Immediate Hearing of their Motions to Consolidate and to Dismiss or Affirm. (R. 151) Petitioners likewise had five days (Rule 31) within which to answer this motion. February 17 and February 18 were a Saturday and Sunday respectively. Counsel for petitioners was engaged in court on the morning of February 19. Near noon he was advised by telephone to appear before the Court of Appeals in these cases at 2:00 P. M. that very afternoon. Counsel appeared at this summary hearing, advised the Court of Appeals that he was totally unprepared to argue the merits of these motions on such short notice and pointed out that he had not even received for his use copies of the petitions and had only had the opportunity to read the Petitions hurriedly on February 14. Counsel pointed out that this review of the petitions disclosed that the circumstances under which previous petitions for Habeas Corpus had been considered had changed and that a state of war no longer in fact existed between the United States and Germany. Counsel further pointed out that the Bonn Constitution, which had been adopted with the approval of the United States, now prohibited capital punishment in all of Western Germany and that the recognition of this Constitution by the United States was a legal abandonment of any right it might have had to execute petitioners under enactments which had been issued by the Zone Commanders while they were allegedly acting as Trustees vested with legislative authority over Occupied Germany after Germany's unconditional surrender and during the

period when a state of war existed between Germany and the Allies. Counsel also called the attention of the Court of Appeals to its rules and requested the opportunity to file briefs in opposition to respondent's motions within the time prescribed by the rules of that court, because the matters involved were important and should not be decided by that court summarily and without being fully briefed. Counsel objected to a summary hearing of seven cases at one time and to the consolidation of their different cases, particularly as each case involved a death sentence.[3]

Notwithstanding these arguments, protests and objections, the court below acted in the same hurried fashion as the District Court and summarily on the afternoon of February 19 consolidated all seven cases for hearing and affirmed the dismissals. The opinion of the Court of Appeals consists of a single sentence in its Order reading as follows:

> "*Johnson* v. *Eisentrager*, 339 U. S. 763; *Flick* v. *Johnson*, 85 U. S. App. D. C. 70, 174 F. (2d) 983, cert. den. 338 U. S. 879." (R. 155.)

Under the Rules of the Court of Appeals (Rule 27), mandates generally issue upon the expiration of fifteen days from the date of that court's judgment. The Order of February 19 of the court reduced this time and ordered the mandate to issue Friday, February 23. Under the usual practise in the Court of Appeals, petitioners would have had forty days after the filing of their Notices of Appeal within which to file their record on appeal. Then they would have been entitled to forty days after the filing of the record on appeal to file their briefs. Respondents would then have had twenty days within which to

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[3] Transcript of Proceedings, Court of Appeals, February 19, 1951, pp. 5-18.

file their brief. Petitioners would then have had until three days before the date set for argument within which to file a reply brief and would have been afforded on the day of oral argument an hour within which to argue the case. Of course, had the cases proceeded in their regular course in the District Court, they would still be pending there for decision. The unseemly haste with which the District Court and the Court of Appeals acted has reduced the various periods of time given litigants by the rules of the courts below to a mere seven days, which included one legal holiday, a Saturday and a Sunday. This means that the proceedings below, which in their ordinary course, would consume months of time were disposed of summarily and without any semblance of a hearing in less than a week. This speed deprived counsel of any opportunity to brief the serious questions of law involved, to study the petitions in order to make any necessary amendments or supplements thereto that he might deem advisable and of any chance of affording genuine legal representation to the petitioners. The procedures of the courts below were such a departure from the ordinary course of justice as to require a reversal on this ground alone.

Even in the thirty days allowed by this Court for the filing of this petition, counsel has been seriously handicapped through a lack of records and the inability to consult with trial counsel who represented petitioners in the trials which occurred in Germany. In the short time allowed and within the limitations of a petition for certiorari, being mindful of the many admonitions of this Court that such petitions should be "summary and short" (Rule 38), counsel will summarize briefly the cases, now consolidated before this Honorable Court.

The Case of Oswald Pohl

Petitioner, Oswald Pohl, at the time of his arrest held the position of Chief of the Office of Economic Administration of the SS. Petitioner Pohl was a defendant in case No. 4 known as the SS and Concentration Camp case tried at Nurnberg. Respondent McCloy announced in his decision authorizing the execution of Pohl, that the finding of guilt against Pohl and the sentence of death entered thereon was rendered by a Military Tribunal "established under U. S. Military Government Ordinance No. 7 for the trial of war criminals." In deciding that there would be no modification of the death sentence imposed upon Pohl, Respondent McCloy ruled:

> "The case is concerned with the administration of the Concentration Camps as an adjunct of the SS. Two of the defendants were sentenced to death. One of them Oswald Pohl, was found to have had personal responsibility for the administration of the camps. The liquidation of the Jews in the Auschwitz camp, the destruction of the Warsaw ghetto, and the pillage of the Jews in the East in the action known as 'Action Reinhardt' were among the crimes chargeable to this organization. Not only was Pohl, according to the judgment, the head of this administration, but he personally directed and supervised the destruction of the Warsaw ghetto, and he personally selected prisoners for medical experiments. I naturally can find no basis for clemency, and the Board recommended no modification of the sentence."

Basic errors were involved in the conviction of Pohl which deprived the United States Military Tribunal in Case No. 4 of jurisdiction. In the first hearing of the Pohl case, the Tribunal committed prejudicial error in receiving material which it agreed not to utilize in its consideration of the case and notwithstanding this agree-

ment of thereafter *predicating its first judgment largely upon this excluded material.* This procedure, of course, deprived Pohl of any right to answer the material as it had been formally excluded by the Tribunal. Instead of granting a new trial when this error came to light on review, the original American Judges who participated in the trial were recalled to Germany and went through the formality of permitting defendants to answer the excluded material and then with certain reductions of sentences, which of course does not apply to petitioner Pohl, the original erroneous judgment of the Tribunal was reentered. Such procedure deprived petitioner of a fair and impartial trial. A new trial was the only proper way to correct such flagrant error.

Pohl questions the validity of the sentence of death imposed upon him for numerous reasons. Pohl alleges that United States Military Tribunal II in case No. 4 was illegally constituted and attempted to try alleged violations of International Law which in fact never existed as such. Pohl alleges that the trials were conducted under the illegal authority of Control Council Law No. 10, an ex post facto enactment which is unconstitutional as an illegal limitation on the Americans participating in the trial of Case No. 4 including the three American Judges who presided at the trial. Pohl alleges that the guarantees of a fair trial afforded by the Constitution of the United States were violated because he was denied the defense that in whatever he was charged with doing he acted under orders which he had no power to change or vary. Pohl also charges that ninety per cent of the so-called evidence in his case consisted of hearsay documents. These documents consisted of captured German documents and papers which were received in evidence against Pohl even though it was never shown that Pohl had any connection with

either the preparation thereof, had signed them or gave approval thereto by initialing. Pohl alleges that the United States has now recognized the Federal German Government constituted under the Bonn Constitution. As now constituted the Federal German Government has sole judicial rights in Western Germany, except those powers expressly reserved to the United States, which reservation failed to reserve the power to *execute* Pohl for the reason that he is non-American, is *not* confined in a *German* prison but on the contrary is confined in a United States Military prison in Western Germany. Pohl alleges that he is not an enemy alien, but is a human being restrained of his liberty, and is within the protective provisions of Congressional enactments pertaining to Habeas Corpus and vesting jurisdiction in the United States District Court for the District of Columbia to hear and determine his petition under 28 U. S. C. 2241. Pohl further alleges that the recognition of the Bonn Government by the United States ends the state of war with the United States and that all Germans, including Pohl, are now citizens of the new German Government by automatic and specific provisions of the German law and German Constitution. Pohl further alleges that the Bonn Constitution has abolished capital punishment in Germany and that the United States lacks authority to carry out death sentences in Germany today. Pohl alleges that his imprisonment and restraint by the United States is now illegal and that his conviction was obtained in the prejudicial war hysteria period following the unconditional surrender of Germany to the Allies.

Persons tried at Nurnberg by United States Military Tribunals and under United States Ordinance No. 7 were brought to trial on the theory that the Allied Powers, upon the unconditional surrender of Germany, became the legis-

lative authority for Germany. In other words, the Allies were trustees exercising legislative powers for conquered Germany. This is the theory under which the Allied Control Council enacted Control Council Law No. 10. United States Military Ordinance No. 7 merely adopts as crimes those crimes which had been broadly defined in the Moscow Declaration and in the London Charter and Agreement and in Control Council Law No. 10. The United States Tribunals functioning in Nurnberg under United States Military Ordinance No. 7 are American Tribunals. In fact, the London Charter and Agreement forbids the establishment of any International Military Tribunal under the Charter unless such tribunal be *identical* with the first tribunal. The Nurnberg tribunals bear no resemblance to the First Tribunal which was made up of judges and prosecution staffs from the Four Victorious Powers. The Nurnberg prosecution staff, the Nurnberg personnel and the Nurnberg Judges were Americans. Nurnberg procedures were all established by exclusive and unilateral action of the United States acting through its chain of command. All reviews are conducted unilaterally by the United States alone.

Moreover, the Moscow Declaration specifically forbids any International trial in the Occupied Zones of Germany unless such a trial is authorized unanimously by the Prosecutors' Committee of the four victorious Powers. The indictments in the Pohl case and in the other Nurnberg cases involved in these proceedings were brought on the sole authority of the Chief Prosecutor for War Crimes of the United States and in the name of the United States alone. Control Council Law No. 10 likewise by express terms requires unanimous action of the prosecutors of the four victorious Powers before an International trial can be had in Germany. The sentence of death imposed by

this United States Tribunal, which acted under rules of procedure which in and of themselves were illegal and deprived Pohl and the other petitioners tried at Nurnberg (here involved) of a fair and impartial trial, can not be lawfully carried out. Since the first abortive judgment of guilt was entered, it has been reviewed by the Military Governor for Germany, General Clay, Congressional Committees and by a Special Review Board, and most recently by Respondent McCloy. During the course of these reviews, the political situation in Germany has completely changed. The former Trusteeship under which the Control Council acted has come to an end. In fact, before the creation of the Bonn Government for Germany, the Control Council came to an end. In order to function it had to act *unanimously*. The Russians have withdrawn from the Control Council and thus terminated it and its functions. Since this action by the Russians, the United States, Great Britain and France have ended their exclusive right to legislate for Germany and have now conferred upon the Federal Government for Western Germany full legislative and judicial powers. These legislative and judicial powers now control the sentences here involved.

The legislative authority for Germany has abolished capital punishment. This abolition of capital punishment has been agreed to by the Allies, including the United States. The sentence of death to Pohl and all of the other petitioners herein named, legally thus has been converted to a sentence of less than death, that is, to a maximum of a life sentence.

The sentence of death now sought to be carried out by Respondent McCloy is predicated on the grounds asserted in his final decision which we have quoted *supra*. In considering this decision of the High Commissioner, this Court should know that the United States Military Tribunal at

Nurnberg in its findings and decision pertaining to Pohl held that he had *nothing* to do with the apprehension or the release of inmates of concentration camps, that he had *no* authority of punishment over SS personnel stationed at concentration camps and had *no* authority of punishment over concentration camp inmates. Yet the finding of guilt seeks to attribute to Pohl alleged offenses which were carried out by Ministries in the SS over which he had no authority and no control. Thus, all police work was done by the State Security Police. Pohl had nothing to do with this department. The apprehension, trial and punishment of acts and crimes against the security of Germany were under the Office of Judicial Affairs of the SS. Pohl had nothing to do with this department. The trial and apprehension, and the sending of suspects to prison, were under the control of the Office of Upper SS Police Leaders. Pohl had nothing to do with this department. Yet, curiously, Pohl was charged and found guilty of alleged crimes of these departments. Further, Pohl is charged and found responsible for the selection of persons for medical experiments in concentration camps, when this selection was under the exclusive control of the Office of Medical Sanitation and Hygiene Affairs of the SS. Pohl was never a member of this Department. Pohl was precisely what his title indicated, Chief of Economic Administration. He held this position from 1934 to 1945 and none other.

When we consider the decision of Respondent McCloy, we find that he takes the position that the office of Economic Administration controlled the management of all concentration camps in Germany. From this the High Commissioner erroneously argues that Pohl is responsible for all crimes *charged to the SS.*, notwithstanding that *no crimes were proven to the Economic office under the control of Pohl.*

Respondent McCloy further states erroneously that Pohl was the SS Staff Chief. That this is erroneous is known throughout Europe. The SS Staff Chief was the General of the Military SS, Karl Wolff. Wolff was Chief of the Office of the Personal Staff of Himmler. Himmler was the real and responsible head of the SS. As Wolff was never brought to trial for political reasons, the activities of his Department are now charged to Pohl. Yet Pohl never functioned as Chief of Staff of SS and had no authority except in the Office of Economic Administration.

Respondent McCloy further states Pohl was guilty of certain actions against the Jews. Yet the German who originated these activities and was responsible for them was sentenced to seven years in prison. There was no basis for this statement for the reason that no judicial, police or penal authority were in the Office of Economic Adminstration.

The other errors apparent in the final decision of High Commissioner McCloy are detailed in Pohl's petition to which the Court is respectfully referred, which fully explains away the charges on which High Commissioner McCloy bases his final decision to execute Pohl.

Pohl's petition contains charts which illustrate clearly the division of authority in the SS and the responsibility of competent members of the SS. These charts clearly demonstrate the allegations of Pohl's Petition. They show that Pohl has been erroneously held responsible for acts and activities of numerous Departments over which he had no jurisdiction or competency and which activities did not originate in nor come under the jurisdiction of Pohl's Office of Economic Administration. These allegations of fact which are admitted for the purposes of this application fully justify the issuance of a Writ of Habeas Corpus and a full hearing in Pohl's case.

The Cases of Erich Naumann, Paul Blobel, Werner Braune and Otto Ohlendorf

Petitioners Erich Naumann, Paul Blobel, Werner Braune and Otto Ohlendorf, at the time of their arrest were officers of the SS Elite Guard. Petitioners were defendants in Case No. 9, known as the Einsatzgruppen case at Nurnberg. Respondent McCloy announced in his decision authorizing the execution of these petitioners that the finding of guilt against them and the sentences of death entered thereon were rendered by a Military Tribunal "established under United States Military Government Ordinance No. 7 for the trial of war crimes." Respondent McCloy in his decision states that the evidence in Case 9 consists mainly of undisputed reports of German organizations and statements of German leaders, some of whom were defendants in Case No. 9. Basically in his decision of January 31, respondent McCloy took the position on broad general conclusions that the responsibility of these defendants was such, and the offenses of the Einsatzgruppen so great, that clemency would not be applied, and confirmed the death sentences for these petitioners.

The arguments pertaining to the general invalidity of the sentences imposed by the United States Military Tribunals at Nurnberg discussed under the section of this Petition entitled "The Case of Oswald Pohl" are equally applicable to Case No. 9. So are those dealing with the ending of the state of war between the United States and Germany. This Court is respectfully referred to these arguments in considering Case No. 9. Such arguments will not be repeated here. Petitioners would have shown, if given an opportunity below, that numerous prejudicial errors occurred in the trial of their cases and the proceedings were such a departure from proper judicial process under the Constitution, treaties and laws of the United States as to de-

prive United States Military Tribunal in Case No. 9 of jurisdiction.

Prior to petitioners' trial, petitioners and numerous other members of the SS Elite Corps were subjected to long and harrowing interrogations by the prosecution. These interrrogations were conducted under conditions which placed petitioners and their respective witnesses under great mental strain and anguish. Petitioners were never advised that they had any right to counsel during these interrogations and never were permitted to have counsel. At the trial these interrogations were used in evidence against petitioners over their objections, and had the effect of requiring petitioners to be witnesses against themselves, in violation of the express terms of our Constitution. This error was magnified by the fact that the Tribunal ruled that "these defendants are entitled to every right guaranteed by the United States Constitution as introduced in all subsequent agreements with other nations which brought about these trials." (Transcript of Case No. 9, page 399). Concededly, petitioners have been deprived of all rights afforded by the Geneva Convention on prisoners of war, notwithstanding that they were captured soldiers of Germany.

Petitioners were effectively deprived of witnesses for their defense in the following manner. The Chief Prosecutor in Case 9 stated before the trial, at a press conference in Nurnberg, that all members of the Einsatzgruppen who had not been accused at Nurnberg should be *extradited to Soviet Russia.* This statement appeared in various newspapers throughout Germany and effectively prevented officers and soldiers of Einsatzgruppen from testifying as witnesses for petitioners, the reason being that everyone who by his testimony would admit that he had knowledge of and/or participated in the activities of Einsatzgruppen in Soviet Russia could expect extradition to Russia, which in

most cases meant death. This type of announcement, in Case No. 9, coupled with the power and authority of the prosecution to incarcerate witnesses indefinitely, necessarily affected the credibility of all testimony offered by the prosecution from any threatened member of the Einsatzgruppen.

The indictment in Case No. 9 was not clear and concise, with particulars of the offenses charged against these individual petitioners. On the contrary, the indictment charged all defendants with war crimes, crimes against humanity and membership in an organization declared to be criminal, that is the SS. The indictment mentioned eighty six specific matters but failed to charge how any individual defendant was involved in these matters. It charged all defendants with collective guilt. Twenty of the eighty six criminal actions charged in the indictment did not refer to any of these petitioners. These twenty counts alone covered 115,000 executions. Certainly the evidence received in this case should have been limited as to each petitioner to the matters charged against him in the indictment. This has been the law even in Nurnberg since the first International Military Tribunal rendered its decision under the London Charter. But the Tribunal in Case No. 9 not only permitted the prosecution to submit evidence that did not relate to any charges in the indictment but even sentenced petitioners for *actions outside the scope of the indictment*. Thus, petitioner Braune was sentenced because of (a) alleged execution of certain Jews at Sinferopol, (b) combing-up the town of Sinferopol for suspect persons and (c) the alleged execution of franctireurs and partisans at Eupatoria. No mention whatever appears of charges (b) and (c) in the indictment.

The Tribunal admitted that it received much evidence which did not pertain to any charge contained in the indictment, giving as its reason therefor the following (Tran-

script of record of Case 9, page 6740): "Although forming no part of the charges in the indictment, the systematic attempts * * * as described in official German documents are interesting in that they shed light on the mental attitude of the executioners." Under this ruling numerous documents having no connection with petitioners were received in evidence to show petitioners' mental attitude. Such a practise violates basic rules of American penal procedure which control even its Military Tribunals sitting in occupied territories.

The President in Case 9 engaged in lengthy interrogations of petitioners of a highly prejudicial nature and inflammatory in character, and then used answers obtained to hypothetical questions as a basis for establishing the *illegality* of the superior military orders under which all of the petitioners were duty bound in time of war to follow, with death as the punishment for disobedience. Thus, the President after a lengthy argument with one of the defendants who insisted that the carrying out of military orders and the execution by the military of condemned persons was not "murder" but was the carrying out of military orders which, if disobeyed, meant death, asked the hypothetical question if he would shoot his own parents if he were ordered to do so by his superiors. This defendant first took the position that he could not answer such a question as he never had such a decision to make. He was ordered by the President to answer the question by the following morning. The next morning the President insisted that the question be answered and the witness replied that even if ordered by his superiors, he would not shoot his parents. This meant that he would himself risk death rather than shoot his own parents. A natural and courageous position to take. Yet this very statement was used by the Tribunal in its judgment as proof that under German Military Law petitioners had a *choice* in obeying superior

orders because they would not execute their parents. Given *such a "choice,"* the Tribunal then ruled that the carrying out of binding military orders in time of war was a war crime deserving of death.

The same technique was used in questioning petitioner Naumann. The President insisted upon Naumann answering whether or not the Fuehrer Order requiring executions by the Einsatzgruppen was "morally wrong." Petitioner replied that the order was harsh, terribly harsh, for the Einsatzgruppen and was against their inner feelings, yet it was a binding order and the Einsatzgruppen had to act on it, and to that extent must be "in full accord with the order except for their inner misgivings and had to carry it out." The Tribunal after such an improper method of interrogation found from these statements that petitioners had no doubt about the legality of the Fuehrer Order, were in accord with it and deserved death. Petitioner Braune's examination covered 64 pages of the record by the President, whereas his entire examination by the prosecution covers only 55. Such practices destroyed impartiality and earned for the Presiding Judge throughout Germany the title of "Prosecutor No. 1 in the Ohlendorff case."

Moreover the Tribunal made the curious and tricky ruling that collective description in the indictment need not apply to each and every defendant but that general references will necessarily apply to a majority of them. (Transcript of Case No. 9, page 6706). Using this as a premise, the Tribunal received reports, documents and other material which pertained to none of these petitioners and based a finding of guilt against the petitioners thereon *in spheres of activity in which petitioners were not engaged and over which they had no competency.* To illustrate, the Tribunal quotes against petitioners the execution of 4000 Jews by the Higher SS—their police leader in Riga—one Jeckeln. Jeckeln did not belong to the Einsatzgruppen and

none of the petitioners or their subordinates had any part in this action. The Tribunal quotes against petitioners the execution of 2100 gypsies and others in Jugoslavia, a distance of 2,000 kilometers from the Eastern front. The Southeast Generals of the German Army have been sentenced as responsible for this affair. None of the petitioners and no member of the Einsatzgruppen had any part in the matter, yet petitioners are condemned for it.

The Tribunal used as a basis of guilt against the petitioners the report of the Russian Government which stated that 760 persons had been executed in Aglen. No document was submitted or any evidence adduced to show that petitioners had any connection with this matter, and in fact they were not concerned in it.

The Tribunal used as a basis for a finding of guilt against the petitioners, excerpts from letters *written by a German Army member to his General in which this soldier reports on certain executions.* None of petitioners had anything to do with this officer, his letter, his Commander in Chief or with the events mentioned in the letter.

Numerous other erroneous findings of this sort based on hearsay documents, which have no connection whatever with petitioners, were made in the final judgment and can be amplified at length on hearing.

Moreover, the indictment was limited to the period from May 1941 to June 1943. Yet the Tribunal received evidence of events occurring *after June of 1943* and found petitioners guilty of matters involved in this evidence *which were entirely outside the scope of the indictment.* The Tribunal obviously confused police activities, activities of other SS units, activities of the Army and activities of other Government agencies all over Europe with the very limited activities of these petitioners confined to military operations in Russia. The effect of the Tribunal's ruling is to

hold petitioners and their co-defendants, 23 men in all, in Case No. 9, responsible for the deaths of millions of human beings who were killed during World War II all over Europe. These killings were the result of military operations on a broad scale and of orders which could not be disobeyed and which were carried out by fifteen Military Commanders in Chief and executed over a front more than 2,000 kilometers long by thousands of men of the armed forces, the police and the SS, and this despite the fact that there were only four Einsatzgruppen units committed to Russia. There were never as many as thirty six Einsatzgruppen units in all of Germany during the entire war. What the Tribunal is saying is that petitioners were responsible for the acts of 5,000 men who were acting under military orders in time of war. Many other fictions appear in the opinion of the Tribunal, such as the "murder" of two million human beings, killing of the insane, burying people alive, rounding up worshippers in the synagogues, yet no evidence pertaining to these petitioners and their Einsatzgruppen activities were submitted or urged by the prosecution as a basis for such findings. All of these so-called findings are based upon hearsay material and reports which have no relation to these petitioners or to the adding up of figures involved in other proceedings and in other trials in which petitioners were not involved.

The theory behind these sweeping findings was that the Tribunal considered itself a "World Tribunal," representing an "imaginary society" which had to enforce International rights and wrongs which heretofore existed only in the heart of mankind and which up until now had never been listed as International offenses. The Tribunal felt that humanity was the sovereign which had been offended and that it now had to prosecute a new concept in the realm of morals, which it considered was quite an innovation in

the empire of law. (Transcript of record, Case No. 9, pages 6715-6745). It was on the basis that the laws of humanity must remain inviolate that the Tribunal considered itself competent to charge these petitioners with all the crimes of Hitler's Reich committed all over Europe and described in all their gory details in the Tribunal's judgment. Of course, this United States Military Tribunal has no such authority. Its authority was strictly confined to that which had been conferred upon it by Ordinance No. 7. It should have based its finding upon individual guilt and individual responsibility. It should never have so generalized in a case involving capital punishment by hanging. Yet this was the Tribunal's conception of its authority. Therefore it lost jurisdiction of this case. Petitioners were military men engaged in military operations in Russia. It was their task to keep the German lines clear as their comrades in arms advanced in Russia. They had to protect their homeland and their sources of supply. When German troops were murdered by partisans and other members of the civilian population, it was the unhappy duty of these men to carry out orders received from their Commander in Chief for the executions of these partisans and other civilians, including commissars, on a reprisal basis. Every execution involves the execution of a defenseless person or persons. Soldiers and petitioners do not like this type of killing, but what choice do they have in time of war when they receive such orders but to carry them out. It is well known that if such orders were disobeyed, under Hitler's iron rule that the disobeying officer would be executed.

Concerning the denial by the Tribunal of any defense to petitioners based upon superior orders, it must be borne in mind that German, American, English and French laws governing ground warfare during the period involved in

the indictment provided that members of armed forces could not be punished for offenses committed under the order or sanction of their Government or Commanders. *Article 347 of the American Rules for Land Warfare, Section 443* of the *British Manual and Military Law, Section 47* of the *German Military Code*. The fact that the United States and England changed their rules of land warfare in 1944 can have no bearing on this case, as the indictments here involved covered the period from May 1941 to June 1943. The attempt, therefore, to make the carrying out by petitioners of superior military orders in time of war a crime was ex post facto and illegal. Such a situation deprived the United States Military Tribunal operating under the Constitution, treaties and laws of the United States of jurisdiction to impose the sentences it did for such "offenses" because they did not become offenses until long after they were committed under binding military orders. If such a principle were permitted to stand, it would mean that any victorious power could make illegal any military command of the defeated power and subject defeated soldiers to punishment including death. Certainly the United States does not want to establish such a vicious principle. In weighing such a principle, it must always be borne in mind that petitioners were not the source of the orders involved which controlled their actions. No petitioner formulated these orders. The orders were Fuehrer orders, that is, orders coming from the head, the Commander in Chief of the German Army, and, therefore, petitioners had no choice but to obey them or refuse and die. It is useless to discuss the unwillingness to carry out these orders, and whether petitioners agreed or did not agree with the orders, as refusal under German Military Law by any of the petitioners to carry out these orders when

given at the front in time of war carried but one punishment—death!

It has been settled since the judgment of the International Military Tribunal which first sat at Nurnberg, and which represented the United States, Great Britain, France and Russia, that before any German officer can be held criminally responsible *responsible* for carrying out an order, that he must be in a policy making position and had the authority to change the order. He must be able to control or change the order. No petitioner was in any such position. Each petitioner was in a combat area engaged in military operations away from his homeland. They took no part in the formulation of the orders and are not responsible therefor. The implication involved in the convictions of the petitioners, all of whom are military men and whose actions consisted in the carrying out of military orders in time of war which they did not formulate, had no control over, could not change and which if violated meant death, must be corrected by this Court in the public interest and in the political and military interests of the United States.

The dilemma facing the Court is this. If petitioners violated military orders, they were sentenced to death. For carrying out such military orders, they are likewise sentenced to death. Is this the situation which is to surround officers of the United States when the United States becomes engaged in a war for its existence? Yet, unless this situation is corrected, this will be precisely the position of our officers in time of war. This makes for an insufferable position particularly if any American army ever suffers defeat and its officers and men are captured by vindictive enemies.

The Cases of Georg Schallermair and Hans Th. Schmidt

As we have shown in our Summary Statement, the cases of Georg Schallermair and Hans Th. Schmidt differ from those of the other petitioners in that their trials were conducted by a United States Military Commission composed of officers of the United States Army sitting at Dachau under a letter authority from the Headquarters of the United States Forces, European Theatre, dated July 16, 1945. This letter purported to authorize trials by Military Government Courts of charges for war crimes. There is no dispute as to the character of the Tribunals at Dachau. They are American. The Solicitor General, in his Memorandum in Opposition to our request for a Stay of the Mandate of the Court of Appeals, states "Schallermair and Schmidt were tried and convicted by United States Military Commissions . . ." As it is alleged and has never been denied, the state of war between the United States and Germany is at an end. The factual basis supporting this allegation will be discussed in the argument. Therefore, this aspect of the case will not be rediscussed under this heading.

The Dachau trials have been the subject of much criticism. Numerous investigations have been had of the Dachau trials. These investigations have established abuses by the prosecution of defendants and witnesses and have cast grave doubts on the validity of the Dachau proceedings.[4]

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[4] American Atrocities in Germany in The Progressive (Feb. 1949); Malmady Massacre Investigation Hearings before a Sub-Committee of the Committee of Armed Services on Senate Resolution 42, U. S. Senate, 81st Congress, First Session, 1949, with special reference to the testimony of Judge Van Roden and of Mr. Finucane, pages 225, 301, 949, 1073 and 1102; Testimony of Dr. Aschenauer, 1455; Utley, "The High Cost of Vengeance" pages 185 et seq. 1949, Belgion "Victor's Justice" 1949,

A review of the evidence adduced in both the Schallermair and Schmidt cases will disclose that the convictions are based primarily upon hearsay evidence and opinion evidence of a hearsay character. Notwithstanding that the Manual for Courts Martial, United States Army, specifically provides that "Hearsay is not evidence", the Directive on the Dachau Trials, dated August 25, 1945, (Regulation Controlling Military Commissions, Headquarters, United States Forces, European Theatre) Section 3 provided: "Evidence Admissible. Such evidence shall be admitted before a Military Commission as, in the opinion of the President of the Commission, has probative value to a reasonable man."

This directive was used as a basis for the receipt of hearsay and opinion evidence against petitioners Schallermair and Schmidt at Dachau. Both Schallermair and Schmidt have been condemned to death. No written opinions were filed to support these sentences. Respondent Handy's opinion confirming the death sentence in these cases is dated January 31, 1951. In refusing clemency to Schallermair and Schmidt, he found them "guilty of atrocities in concentration camps." After stating generally that many people were executed in concentration camps in Germany, he ordered the executions of Schallermair and Schmidt.

(A) *The Case of Schallermair.*

Respondent Handy said of Schallermair:

> "Georg Schallermair, denominated a *roll call leader,* was directly in charge of prisoners at Muehldorf, a subcamp of Dachau. Large numbers of inmates died

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and see Reel, The Case of General Yamashita, page 242 (1949); William Henry Chamberlin "Vengeance, Not Justice" in Human Events, Volume VI, No. 20, Issue 277, May 18, 1949.

> as a result of beatings which he personally administered. Of 300 people brought to the camp in the fall of 1944, only 72 survived some four months later. He visited the morgue *daily* with an inmate dentist to extract the gold teeth from the dead bodies from the camp. There are no factors or arguments which can possibly justify clemency in this case." (Italics ours)

The evidence adduced concerning Schallermair shows that he was accused by 7 prosecution witnesses of having maltreated inmates at Muehldorf. However, these witnesses only testified that they had seen petitioner beat certain prisoners. The Tribunal then permitted these witnesses to state that they later heard from hearsay sources that such prisoners had died at the prison hospital. No witness was able to state of his own personal knowledge that any prisoner died as the result of any punishment inflicted by Schallermair. At the time when the prisoners were supposed to have died at the camp, a serious typhus epidemic had swept the camp which resulted in death to numerous prisoners. This accounts for a great number of the deaths which are mentioned in the decision of General Handy of January 31.

A further charge made against Schallermair is that he went with an inmate dentist who extracted gold teeth from dead bodies at the camp. Of course, all now know that these extractions were done under orders issued by Himmler of the SS and a roll call leader in a camp would have no competency over the changing, carrying out or execution of such orders. These orders were carried out by the dentist, not by Schallermair, and he cannot be charged with any crime because he saw a dentist acting under orders extracting teeth from dead bodies. Schallermair is a bricklayer by profession and he is 56 years of age. He never was a member of the NSDAP. In October 1944 he was

transferred without any consent on his part from the Army to the Guard Detachment of the Muehldorf Concentration Camp with a rank of Sergeant. In that camp he held a very subordinate position of a roll call leader and had the task of assigning prisoners to work details.

In 1945 Schallermair was arrested by American authorities, subjected to four weeks of interrogation, was not charged with any crime and was discharged by the Americans from detention. Two years later, on the complaint of a former Communist prisoner, Schallermair was brought for trial before a United States Military Tribunal at Dachau. An examination into the testimony of the prosecution witnesses against Schallermair reveals interesting new facts discrediting that testimony which should have required a new trial in the ordinary course of justice. One Communist witness testified to maltreatment. Another witness, Lewin, placed the date of the death of three prisoners, Kan, Kamper and Chines, whose deaths the witness contended from hearsay that Schallermair was responsible for, in the month of March, 1945 shortly after they were supposed to have been beaten by Schallermair. Official death certificates *now* obtainable show that the witnesses Kan and Kamper died early in December of 1944 and Chines on January 5, 1945.

One Friedman, a witness, was permitted to testify that he had heard that Schallermair had beaten some prisoners but admitted he had never seen this done. He was further permitted to testify that he had been told by another prisoner that a prisoner was ill because he had been beaten by Schallermair.

One Mark, a witness, stated that an Italian prisoner had broken down after leaving a latrine. Schallermair is supposed to have kicked the prisoner after his collapse. No witness was produced to establish the cause of the death of

this prisoner, much less that anything that Schallermair did caused his death. As the prisoner was ill, and collapsed the chances are that he died of typhoid fever which was sweeping the camp at the time.

After the conviction of Schallermair, which was broadcast over the radio in Germany, three former prisoners from this camp of Jewish religion, Tisza Vary, Moritz Baruh and Jakob Algava, contacted defense counsel for Schallermair. These prisoners at all times were members of the prison unit under the charge of Schallermair during the time when he is supposed to have so mistreated prisoners that they died. All three of these former Jewish prisoners, who have nothing but hatred for German concentration camps, the SS and concentration camp guards, because of their own personal sufferings, have courageously and voluntarily stated that they know for a certainty that Schallermair never mistreated any prisoner in such a manner as to cause his death. They further state that had such mistreatment occurred at this particular camp, they would certainly have known about it. Copies of these affidavits have been furnished counsel for Schallermair and we are informed that the originals thereof were mailed direct to this Court. These affidavits of newly discovered evidence, in view of the hearsay character of the "evidence" used as a basis for a finding of guilt, are sufficient to require a new trial of Schallermair. Such new trial should be granted in the public interest as well as in the interest of justice. In America defendants are not condemned to death *on hearsay.*

(B.) *The case of Schmidt.*

Respondent Handy in affirming the conviction and ordering the execution of Schmidt, ruled

> "Hans Schmidt was the acknowledged adjutant of the Buchenwald concentration camp for approximately

three years. It was estimated that at one period while Schmidt was assigned to this camp, approximately 5,000 prisoners, including substantial numbers of French, Russian, Polish and Czech nationals, died each month as a result of the conditions under which they were forced to live and the cruelties inflicted upon them by the SS. As the SS Adjutant, Schmidt was in a very responsible position in the administration of the camp, frequently acting as the temporary commander during the absence of Colonel Pister, the Camp Commandant. Accerding to the statement of Pister, Schmidt participated very actively in the *activities* of the camp, and had to be restrained because he frequently assumed greater authority than was actually delegated to him. He was in charge of *all* executions of inmates, including the execution of several hundred prisoners of war by a special unit called 'Commando 99.' These executions were carried out in a former horse stable converted into what appeared to be a dispensary. As the unsuspecting victims were purportedly being measured for height, they were shot in the back of the head with a powerful air pistol concealed behind the wall. Sometimes as many as thirty victims were thus disposed of on a single occasion. Some of the executions supervised by Schmidt took place in the camp crematory where the victims were hung from hooks on the wall and slowly strangled to death. I can find no basis for clemency in this case." (Italics ours)

Basic fundamental errors are apparent in the decision of respondent Handy in ordering the execution of Schmidt. Schmidt was not a person holding an office of high responsibility at the Buchenwald Concentration Camp. Like Schallermair, Schmidt was condemned by a Military Tribunal at Dachau. No opinion supports this judgment of conviction. Since this judgment was rendered, counsel for Schmidt obtained numerous sworn statements and new evidence which clearly refute and destroy every alleged "fact" upon which respondent Handy's decision is based.

Seven submissions of new evidence were made as follows: October 19, 1948, January 19, January 25, February 22, April 11, April 27, 1949 and February 22, 1950. These submissions are in direct contradiction of the so-called hearsay proofs received during the course of the trial. Since the original trial, the death sentence of the Adjutant to the notorious Camp Commando Koch, Heckman, has been reduced to life imprisonment, and the sentence of the Adjutant of the Camp Commando of Dachau, Detmers, have been reduced from 15 to 6 years. The name of Buchenwald is a sad one and the mere association of Schmidt with this name is damning. Schmidt did not go to Buchenwald to act as Adjutant of his own will. The bad reputation of Buchenwald came into being when the camp was under the command of Koch. For his crimes Koch was sentenced to death by a German Military Court which inquired into the wrong doings of members of the SS in Buchenwald. In these proceedings Schmidt was released without charges. Schmidt never had any official connection with Koch. When Schmidt started his service as Adjutant in Buchenwald Pister was the Commander. Under Pister, conditions in Buchenwald essentially improved. New evidence by way of affidavits have been obtained by defense counsel in Germany and have been submitted to establish these facts beyond question.

The number of deaths, 5,000 monthly as set forth in respondent Handy's decision is incorrect. Buchenwald included 90 camp outlets, i. e., war material plants. The total number of deaths during the whole period of existence of the camp from 1937 until 1945, a period of seven and one-half years, was 53,000. Included in this figure are deaths caused by air raids and the many thousands of deaths caused by illness and accidents during the last months of the war which occurred during the transport of sick

prisoners from evacuated camps. With these records *now* available, it is clear that the statement that approximately 5,000 prisoners died each month as a result of conditions under which they were forced to live is flagrant error. Moreover, none of these deaths can be charged to Schmidt. An Adjutant has no competency to fix, alter or change camp conditions. He is a mere scrivener for the Commander of the camp. The assertion that Schmidt frequently acted as temporary commander during the absence of Pister is misleading. Pister, in his statement of March 4, 1947 (p. 35a), which statement is relied upon by respondent Handy as a basis for his final decision, asserts that the only authority of Schmidt during his absences, which were very seldom, was to sign orders for transports which were ordered by Pister in advance. These transfers pertained to prisoners who were being sent as laborers to other camps. No evidence was submitted that Schmidt ever exceeded this authority, much less that he was responsible for or ordered any excesses beyond his authority. Actually, during the absence of Pister, Schobert was the camp commander and not Schmidt. This fact is now established by three affidavits of Hellmut Schmidt, Dr. Bender and Barnewald, submitted as new evidence on May 22, 1950. Schobert also testified to this effect at the trial. Schmidt never acted as camp commander as there were always officers who held higher ranks than he did who were assigned to this camp and who acted in the absence of the actual commander.

Moreover, respondent Handy states Schmidt was "in charge" of the executions of prisoners belonging to this camp. This is just not so. An Adjutant does not have charge of executions. Schmidt's function was to attend on orders executions outside the Camp at a fixed place, just as Landsberg today is designated as a place of execu-

tion. Certainly the American Adjutant at Landsberg would not be responsible for Colonel Graham's executions there even if Graham issued illegal orders. Schmidt was to witness the carrying out of executions in pursuance of sentences passed by Judges of Whrkreis XXII or of the Reichsfuehrer SS and nothing more. Schmidt attended such executions on specific orders of the Camp Commander or the SS Police. New evidence was submitted to clarify this aspect of the case on April 27, 1949 and February 22, 1950. In such circumstances Schmidt cannot be held responsible for the executions or in the manner of the carrying out thereof. There is no evidence in this record to support the statement that Schmidt witnessed any of the hangings and stranglings described in respondent Handy's decision. New affidavits to this effect were submitted to respondents as new evidence. Pister, the Commander himself, made an affidavit that Schmidt had to attend executions on his orders and has pointed out that Schmidt did not have to attend *all* executions. Pister specifically states that insofar as the hangings in the *stables* were concerned, Schmidt *had nothing to do with them.* Pister has testified that the stables were in the compentency of Schobert, not Schmidt.

On April 27, 1949, the functions of an Adjutant in the Germany Army were made known to respondent Handy and it was pointed out that this is an office subordinate in character. Its main duties consist of the handling of paper work without any authorization on the part of the Adjutant to give orders. The Adjutant is fully bound by orders given by his Commander and such position is not one of high responsibility, as it has been described in respondent Handy's decision. To establish that Schmidt had no part in any maltreatment of any persons at Buchenwald,

numerous affidavits have been obtained since the trial. For example, there are affidavits from Brosius, Eichhorn, Albrecht, Geresheim, Breitscheid, Sack, Berger, Klankwart, Willer, Remmecke, Holland, Ackermann, Siebeneichler, Martin, Mueller and Stueber. Pastors and others have likewise issued statements to the effect that no brutality was ever exhibited by Schmidt to inmates while he was Adjutant at Buchenwald. In addition, a startling new piece of important evidence has been obtained and has been forwarded to respondent Handy. On January 24, 1950, the Honorable Leon Blum of France furnished defense counsel with a statement that at the time Schmidt executed the functions of Adjutant to Camp Buchenwald, that neither Blum nor his wife had any cause to complain of any incorrect treatment coming from Schmidt. In the face of such newly discovered evidence, the interests of justice require a new trial of Schmidt's case.

A further and fatal error renders utterly void the trial of Schmidt. The Articles of War and laws of the United States require in capital cases that a defendant charged with a capital crime be present during the entire course of the proceedings. It has even been held that the presence of such a defendant may not even be excused upon an express waiver. In the instant case, because of prison conditions Schmidt became ill. He was injured, blood poisoning set in and he became incapacitated. He missed through illness 90 trial days in a trial which lasted from April 11 to August 14 of 1947. Schmidt's request for a separate trial, because of illness, was denied. He was tried ex parte, was never able to testify in his own defense or confront the witnesses against him and then was sentenced to death. The official statement issued by the Federal Ministry of Justice on February 9, 1951 from

Bonn makes this error crystal clear. We adopt and quote this statement in part as follows:

> "In expressing its opinion on the case of Georg Schallermair and Hans Th. Schmidt as follows, the Federal Ministry of Justice does not do so in order to excuse or to make light of past injustice, but to point out that an execution of the two condemned persons on the grounds of the proceedings carried out against them, should, for reasons of Justice, not take place.
>
> Hans Th. Schmidt is in the 51st year of his life. He was a business man by profession, and since he was not fit for military service owing to war injuries dating from World War I, he was called up to the Waffen SS and in 1942 was drafted to the concentration camp Buchenwald as Hauptsturmfuhrer. In the concentration camp Buchenwald he was the adjutant of the camp commander Pister. He remained in this capacity until the capitulation in 1945. Taken prisoner by the American troops in Austria he was brought up before the American Military Court in Dachau, charged with war crimes, and was condemned to death in the Buchenwald proceedings which took place between 11.4-14.8.47.
>
> During the proceedings Schmidt was unable for a period of 90 days to appear in court, as he was in hospital owing to serious illness. Also during the remaining period of the proceedings the state of Schmidt's health was such as to prejudice his ability to take part in the proceedings. An application of his counsel, that on account of his illness the action against him should be directed separately, was refused by the court.
>
> As a result of his illness, he had to rely solely upon the visits of his American official counsel in order to deposit his statements. These visits were rare and mostly only of short duration. This was not surprising when it is considered that the same official defending counsel had in addition to defend six other defendants in this remarkably grave and complicated case.

As a result of these conditions it was impossible for Schmidt during the course of the main proceedings to convey to his counsel defense, in particular such as was required in order to put the necessary questions to witnesses.

Schmidt was further hindered by his illness from giving testimony in his own case. It need only be mentioned that he had to be carried into court on a stretcher to hear the passing of the sentence.

The Federal Ministry of Justice regards this long absence of Schmidt during the proceedings carried on against him as the essential ground for not allowing the sentence of death which resulted from the above, to be carried out. It is one of the fundamental principles of a due procedure of justice, that the accused —even though he be the greatest of criminals—should not be restricted in his defense, and should find *a full legal hearing*. These principles were undoubtedly not respected in the proceedings against Schmidt. All the subsequent checkings on the proceedings by commissions and review boards—no matter how thorough they were—could not repair these original mistakes." • • •

The death sentence against Schallermair cannot stand. This Court should set it aside.

Questions Presented

1. Whether the speed and undue haste with which the proceedings below were conducted and whether the summary dismissal of the seven Petitions for Writs of Habeas Corpus of petitioners and the summary affirmance thereof deprived petitioners of any semblance of a hearing and of due process of law as guaranteed by the Constitution, treaties and statutes of the United States. Seven death sentences are involved in these cases, five from United States Military Tribunals sitting in Nurnberg and two from United States Military Tribunals sitting at Dachau.

The legality of such proceedings has not yet been ruled upon by this Court. The questions involved are of great importance and should be decided by this Court.

2. Whether the seven Petitions for Habeas Corpus, five pertaining to Nurnberg and two pertaining to Dachau, are controlled by the decision of this Court in *Johnson* v. *Eisentrager*, 339 U. S. 763, and *Flick* v. *Johnson*, 85 U. S. App. D. C. 70, 174 F. (2d) 893. Under this point it will be shown that a state of war no longer exists between the United States and Germany, that petitioners are not enemy aliens and that the United States District Court for the District of Columbia has jurisdiction to issue Writs of Habeas Corpus as sought by petitioners under 28 U. S. C. 2241.

3. Whether the Nurnberg proceedings which involve defendants Pohl, Naumann, Blobel, Braune and Ohlendorf, conducted under United States Military Government Ordinance No. 7, were valid, and whether death sentences based on such proceedings which petitioners contend were illegal for many reasons, should be permitted to stand and to be carried into effect by respondent Graham by hangings at Landsberg, a United States Military prison in Western Germany.

4. Whether the Dachau proceedings involving petitioners Schallermair and Schmidt, conducted under letter authority of July 16, 1945, of the Headquarters of the United States European Command were valid, and whether death sentences based on such proceedings, which petitioners contend were illegal for many reasons, should be permitted to stand and to be carried into effect by respondent Graham by hangings at Landsberg, a United States Military prison in Western Germany.

Specifications of Errors to be Heard

The Courts below erred:

1. In summarily consolidating seven petitions which involve four different trials, five petitions concerning two Nurnberg proceedings and two petitions concerning two Dachau proceedings;

2. In summarily dismissing each petition and in summarily affirming such dismissals in violation of the rules of the courts below;

3. In holding, now that a state of war no longer exists between the United States and Germany, that the cases of *Johnson* v. *Eisentrager*, 339 U. S. 763, and *Flick* v. *Johnson*, 85 U.S. App. D.C. 70, 174 F. (2d) 983, cert. den., 338 U. S. 879 were controlling;

4. In failing to appoint counsel to represent petitioners on the filing of their petitions in proper person when each petitioner had been sentenced to death and questioned the validity of such sentence;

5. In summarily discharging Rules to Show Cause which validly issued against respondents without a hearing, and in summarily affirming such discharges;

6. In entering judgments of dismissal and judgments affirming such dismissals summarily.

Statutes and Constitutional Provisions Involved

1. 28 U. S. C. Sec. 2241:

Power to grant writ

(a) *Writs of habeas corpus may be granted* by the Supreme Court, any justice thereof, *the district courts* and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and

any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner *unless*—

(1) *He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof;* or

(2) *He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States;* or

(3) *He is in custody in violation of the Constitution or laws or treaties of the United States;* or

(4) *He, being a citizen of a foreign state and domiciled therein is in custody for an act done* or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed *under the commission, order or sanction of any foreign state or under color thereof, the validity and effect of which depend upon the law of nations;* or (Italics ours)

(5) It is necessary to bring him into court to testify or for trial.

As amended May 24, 1949, c. 139, Sec. 112, 63 Stat. 105.

2. 28 U. S. C. Sec. 2242:

Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

> If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held. (Italics ours).

3. Amendment V of the Constitution of the United States reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces, or in the Militia,* when in actual *service in time of War or public danger; nor shall any person* be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Italics ours).

Reasons for Granting the Writ

Several of the reasons usually advanced for the allowance of a Writ of Certiorari are present in this consolidated case. The District Court of the United States, without appointing counsel to represent seven condemned men now in the custody of the United States, summarily dismissed without a hearing each of the seven Petitions for Writs of Habeas Corpus filed in their behalf, well knowing that the day following such dismissals petitioners would be executed. Such summary and hasty action deprived petitioners of all semblance of due process of law in the District Court as guaranteed by the Fifth Amendment. The Court of Appeals, in the matter of a few days and in violation of its own rules for the affording of litigants appropriate time within which to answer Motions and file Briefs, summarily consolidated the seven Petitions into one action, notwithstanding that the Petitions involved four separate trials,

two at Nurnberg and two at Dachau, by United States Military Courts in Germany. This summary action and undue haste in the Court of Appeals in cases involving the lives of seven men likewise deprived petitioners of any semblance of due process in the Court of Appeals as guaranteed by the Fifth Amendment. The Courts below have summarily decided questions of first importance which now arise since the end of the state of war between the United States and Germany without any hearings thereon when such questions are of substance and relate to the construction and application of the Constitution, treaties and several statutes of the United States and several executive agreements made applicable to Occupied Germany, which questions are important and which should be settled by this Court. The Courts below have not given proper effect to the applicable decisions of this Court and have decided a Federal question in conflict with an applicable decision of the Court of Appeals. The Courts below have so departed and sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power and supervision of correction. The basic political situation in Germany has completely changed since the *Eisentrager* and *Flick* cases were filed and decided. A state of war between the United States and Germany has come to an end. A new German Constitution has been adopted under the sanctions of the United States and Germany has been restored to its place as a democratic nation of the Western World and is now officially known as the Federal Republic of Germany. The end of the war between the United States and Germany raises new questions which are novel and important and the public interest will be best served by such questions being decided by this Court.

I

The speed and undue haste and the summary and arbitrary manner in which the courts below acted in dismissing and affirming the seven Petitions for Writs of Habeas Corpus of petitioners deprived them of any semblance of a hearing and of due process of law. Five of the petitioners have been sentenced to death by two of the United States Military Tribunals sitting at Nurnberg. Two of the petitioners were condemned to death by two United States Military Commissions sitting at Dachau. The petitions allege facts which raise questions which have never been, but should be, decided by the Courts of the United States.

It is alleged that the state of war between the United States and Germany has ended and that a new Federal Government for Western Germany has been established by the Allies, including the United States. It is alleged that the petitioners are not enemy aliens of the United States. It is alleged that they are detained in a United States prison under the authority of the respondents through chain of command. Respondents' official residences, as they are all officials of the United States acting under the Executive Branch of the Government, are in the District of Columbia. Since the original sentences of death were imposed upon petitioners, the political situation has changed completely. Thus, the United Nations has been established. Its charter is now a treaty of the United States as it has been approved by its Senate. Its Declaration of Human Rights means literally that the Courts of the United States can no longer shut their doors on aliens nor can discriminatory legislation against aliens have any further effect in the United States. One California court has so held.

On August 12, 1949 a new Prisoner of War Convention

was enacted at Geneva. Article 85 of the Convention now provides that prisoners of war liable to penal prosecution shall be entitled, even after indictment and sentence, to the same legal rights as soldiers of the detaining state. This principle applies to legal and procedural rules and to legal remedies against the sentences pronounced against so-called war criminals. The situation is further clarified by Article 106 of the Convention. This changes the rule announced in the *Yamashita* case,[5] that the Geneva Prisoner of War Convention of 1929 gave no protection to acts which were committed *before* captivity and applied only to acts committed *during* captivity. The end of the state of war, which we will discuss later and the recognition of Western Germany of course render the *Eisentrager* case inapplicable to the Petitions for Habeas Corpus filed below. The *Eisentrager* case turns on the basic question of whether an *enemy* alien *in time of war* is entitled to sue in Courts of the United States. The majority opinion holds enemy aliens are not entitled to the aid of our courts in time of war. This is actually the only point which was before the Court and any language in the majority opinion which seems to support an argument that the location of the United States prison is the determining factor is *dictum* and should not be persuasive here.

These important questions were presented by the petitions filed below. The petitions were filed in proper person as petitioners in the two weeks allowed them within which to file such petitions were unable to obtain American counsel and of course were without American funds. Notwithstanding that each petitioner was condemned to death, the District Court after issuing Rules to Show Cause on respondents, the day after the Petitions were filed, without appointing counsel to represent petitioners and without

[5] 327 U. S. 1.

giving them any opportunity whatever to discuss the serious questions raised in their petitions, without reviewing the new changed factual situation as it now exists, arbitrarily and summarily dismissed each petition.

On appeal, within a matter of a few days after appeals were filed, the court below took similar arbitrary action, denied petitioners even the opportunity to file a typewritten brief in support of their positions and likewise arbitrarily and summarily affirmed the District Court, dismissed petitioners' appeals and ordered its Mandate to issue in a few days. All actions taken by the District Court and the Court of Appeals are contrary to the rules of those Courts prescribing the time within which Motions to Dismiss, to Affirm or for Immediate Hearing should be heard. No reasons were advanced for such arbitrary actions by the courts below and for their ignoring of their own rules of procedure. Such rules were enacted to give litigants time within which to present their cases and they should not be arbitrarily brushed aside as they were in the Courts below.

The Fifth Amendment to the Constitution specifically provides that "no person" shall be deprived of his life without due process of law. This is a sweeping guarantee. This Court has consistently struck down summary proceedings which violate this fundamental human right which protects all persons coming under the protection of the Constitution. The summary way and the speed with which the courts acted below deprived petitioners of due process. The principle situation in which the Courts of the United States may proceed summarily is in contempt cases. The principles enunciated in such contempt cases decided by this Court clearly demonstrate that the proceedings below violate the Fifth Amendment.

The famous decision of *Hovey* v. *Elliott*, 167 U. S. 409, illustrates clearly that arbitrary and summary proceedings without proceedings upon inquiry, a hearing before con-

demnation and the rendering of a judgment only after trial, violate fundamental rules of due process and will not be tolerated by this Court. The proceedings below when measured by the rules laid down in the *Hovey* case violated the Fifth Amendment, were incomplete and should be vacated and set aside as a nullity. We quote the language of this Court which clearly establishes this invalidity (pp. 413, 417, 418, 419):

> The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.
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> The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.
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> Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be viola-

tive of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtained, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice courts possess the right to inflict the very wrongs which they were created to prevent.

* * * * * * *

Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case: "By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

And that the judicial department of the government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of due process of law, is well illustrated by another observation of Judge Cooley, immediately following the language just quoted, saying: "The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry' and 'render judgment only after trial.'"

* * * * * * *

If the power to violate the fundamental constitutional safeguards securing property exists, and if they may be with impunity set aside by courts on the theory that they do not apply to proceedings in contempt, why will they not also apply to proceedings against

> the liberty of the subject? Why should not a court in a criminal proceeding deny to the accused all right to be heard on the theory that he is in contempt, and sentence him to the full penalty of the law? No distinction between the two cases can be pointed out. The one would be as flagrant a violation of the rights of the citizen as the other, the one as pointedly as the other would convert the judicial department of the government into an engine of oppression and would make it destroy great constitutional safeguards.

Moreover, as important factual matters are involved in the petitions, these matters should have been determined only after hearings in the courts below in order that the full factual situation might be presented to this Court in a proper and complete record. This Court is also entitled to the views of the courts below based upon the facts developed upon a hearing. On the grounds asserted in this section of the petition, this Court is fully justified in reversing and remanding these cases for a hearing properly conducted in accordance with the rule laid down in the *Hovey* case.

II

The United States District Court for the District of Columbia has jurisdiction to entertain Writs of Habeas Corpus in these cases. The case of *Johnson* v. *Eisentrager*, 339 U. S. 763, relied upon by the courts below is not controlling, as a state of war no longer exists between the United States and Germany. The end of the state of war is alleged below and admitted here. Many facts are available and could be produced at a hearing which would prove the truth of this admitted allegation. We will summarize a few for the information of the Court.

1. The Allied Control Council for Germany which acted as a legislative authority over Occupied Germany is at an

end. Its functions were ended when the Russians walked out of the Council.

2. The United States, Great Britain and France have entered into agreements with Western Germany. Under these agreements a Federal Government has been established for Western Germany. The Constitution, known as the Bonn Constitution, has been adopted by this Western German Government and approved by the United States, Great Britain and France. The new Germany has been "recognized" by the United States.

3. Western Germany is now a member of the Council of Europe, a Council composed of Western democratic nations.

4. A German Foreign Office has been authorized and Germany now has accredited representatives to the Allied Nations, including the United States.

5. Germany is negotiating with the members of the North Atlantic Pact for the creation of an International Army to act under that Pact for the defense of Western Europe against aggression. Peaceful negotiations are now being conducted on behalf of the Western Powers, including the United States, with Germany for the inclusion of a German Army in this International Army, which will be under the command of General Eisenhower.

6. A Four Power Conference has just been concluded in Europe for the enactment of a Four Power Treaty to carry into effect the Schuman Plan, having for its object the pooling of the industrial might of Western Europe for its benefit. The Foreign Ministers of Great Britain, France and Germany have initialed this Plan and it is being submitted to their Governments for approval.

7. An extensive program under the sponsorship of the Department of State of the United States has been undertaken for the exchange with Germany of Germans and

Americans between our two countries. In 1950 grants were awarded and approximately 3,000 Germans have visited the United States for the purpose of studying Federal, State, Municipal, legislative, teaching, publishing, farming, judicial, student and labor functions in the United States. One hundred and sixty-seven American specialists have been sent to Germany for the purpose of assisting in the rebuilding of German institutions. A vast program of student exchange has been undertaken between our two countries involving in this country exchange of students in elementary schools, secondary schools, colleges and universities. Federal Agencies participating in the Plan besides the State Department are the Department of Labor, Department of Agriculture and the Federal Security Agency.

8. German police officials are being trained in this country and are being instructed in United States policies, methods and procedures. Numerous research, extension and economic projects are involved in which the United States and Germany peacefully and mutually participate. Medical and public health projects between the United States and Germany are under way. Many German leaders and specialists, both in professional and lay fields, have been brought to the United States for purposes of consultation. Extensive contacts have been afforded these German leaders with Government officials of the United States, States and Municipalities. An international labor program has been worked out between the United States and Germany. One hundred and twenty-seven leaders in German Governmental affairs are studying matters of Government in the United States. A religious program has been put into effect between the United States and Germany. An exchange is also being made in the publishing and information world between the United States and Germany.

9. Economic agreements are in the process of being worked out between the United States and Germany for the mutual benefit of these nations.

The great formalities which in times past preceded and followed the commencement and the ending of a state of war no longer exist. Wars are now commenced without declarations of war by military actions. Thus, the United States is now engaged in a war in Korea, has suffered over 50,000 casualties, yet no declaration of war preceded this military operation. It necessarily follows that wars once started can be ended by the nations involved without formal declarations. In the field of International Law we have now come to understand that it is the actions of a nation, not formal declarations, that determine the factual international status existing between nations. In this situation, petitioners will certainly be able to prove, if given the opportunity, that a state of war no longer exists between the United States and Germany and that petitioners are nationals of a friendly nation which the United States has recognized and is now at peace.

The purpose of the proceedings below was to test the validity of the death sentences imposed upon petitioners by two types of United States Military Tribunals. Petitioners are now detained under sentences of death in a United States prison at Landsberg, Germany. Respondents are the responsible officers of the United States under whose authority petitioners were tried and sentenced and are now confined. The official residences of respondents are in the District of Columbia. There is no question but what there will be due and prompt compliance by respondents and through them by their subordinates with any orders which this Court may issue concerning petitioners. At the hearing before the Chief Justice of this Court on petitioners' Motion for a Stay of the Mandate of the Court of Appeals, the Solicitor General, the Judge Advocate

General of the Army and Counsel for the State Department all agreed that compliance would be had with any order this Court might issue and voluntarily agreed to stay the executions of petitioners until their cases could be decided by this Court. This should dispose of any question of power.

This Court held in *Ex Parte Yamashita,* 327 U. S. 1 and in *Ex Parte Quirin,* 317 U. S. 1, that an accused enemy war criminal may come into American Courts and challenge the fundamental constitution of the Tribunal which tried him and the validity of his sentence.

This Court said in *Ex Parte McCardle,* 6 Wall. 318, 325-326:

> • • • the habeas corpus legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every Court and of every Judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction.

The petitions below allege, and we submit for the purposes of this application it must be taken as conceded, that the proceedings in which each petitioner was condemned were conducted in violation of the safeguards afforded by the Constitution, treaties and laws of the United States. In fact, it has been held, at Nurnberg that if the proceedings there were measured by the Constitution, treaties and laws of the United States, including the treaty provisions of the Prisoner of War Convention, that the Nurnberg proceedings would be utterly void.

It is further alleged that under the Constitution for Western Germany capital punishment is abolished. This means *no* death sentences can be carried out in Western Germany. It is further alleged that the United States did not reserve specifically the right to execute petitioners and

that they are now detained in an American prison in Germany.

With these new facts before the Court, it is clear that the *Eisentrager* case is not controlling here. A careful reading of the majority opinion in the *Eisentrager* case will show that the basic reason upon which the majority of the Court relied in holding that the United States District Court for the District of Columbia did not have jurisdiction over the petitions there involved was that each petitioner was an "enemy alien." The reasoning behind this decision was that "during the period of hostilities" enemy aliens are not entitled to sue in Courts of the United States. The majority opinion makes it clear that a *friendly* alien is entitled to the protection afforded by the Constitution of the United States. On the question of territorial jurisdiction, this Court concluded (p. 785) that the Constitution does not confer right of immunity from trial and punishment upon an "enemy alien engaged in the hostile service of a Government at war with the United States." While the majority opinion is long, it concludes with the statement that since the Courts of the United States lacked jurisdiction to entertain in time of war suits by enemy aliens, the Court "need not debate as to where, *if the case were otherwise, the Petition should be filed.*" Our case is "otherwise."

We respectfully submit that the ruling in the *Eisentrager* case should be confined to the basis of fact upon which it rested. It should mean no more than an enemy alien in time of war does not have access to United States Courts. For this reason we say that this case is no longer controlling, as it is here alleged that the state of war between the United States and Germany is ended and petitioners are friendly Nationals of a Nation recognized by the United States and with which it is now engaging in friendly and cooperative international relations. In the present situation we submit that such decisions as *Ex Parte Quirin*, 317 U. S. 1, *Dow* v.

Johnson, 100 U. S. 158, *Ford* v. *Surget*, 97 U. S. 594, *Ex Parte Kawato*, 317 U. S. 69, are controlling.

The majority opinion in the *Eisentrager* case expressly disavows any conflicts with the *Quirin* and *Yamashita* cases. This being so, we submit under these two decisions that a prisoners' right to test the legality of a sentence does not depend upon where the Government chooses to imprison him. If this were the case nothing would prevent the Executive Department from arbitrarily arresting without warrant any person, a citizen, a friendly alien, or an enemy alien and immediately removing that person outside the limits of the United States, to, for example, United States prisons in occupied territories or even in brigs of ships at sea. Such an arrest, detention and incarceration on the part of the Executive Department would be illegal. Is it to be said that the prisoner could never test the legality of his detention because he is imprisoned outside the *territorial* limits of the United States even though his jailers are residents of, let us say the District of Columbia, as respondents are here, and are subject to the jurisdiction of the United States District Court for the District of Columbia? The mere statement of this proposition, we submit, in reason and conscience, renders imperative a negative answer. An affirmative answer would open the door to the imposition of unlimited and uncontrolled tyranny by the Executive Department upon any person and would deprive the Courts of the United States of their judicial power to measure the actions of the Executive Department, which must operate under the Constitution, by the rules and principles enunciated in that Constitution and treaties and laws enacted thereunder.

If the *Eisentrager* case means this, then we respectfully submit that the public interest requires a reconsideration of that case.

We take the view that the principle applicable here is

that expressed in the last sentence of the unanimous opinion of this Court in *Ex Parte Kawato*, 317 U. S. 69, 78:

> "The doors of our Courts have not been shut to peaceful law-abiding aliens seeking to enforce rights growing out of legal occupations."

We submit that respondents are within reach of the jurisdiction of the District Court. *Ex Parte Endo*, 323 U. S. 283. At page 306, Mr. Justice Douglas, writing for a unanimous Court, said:

> There are expressions in some of the cases which indicate that the place of confinement must be within the court's territorial jurisdiction in order to enable it to issue the writ . . . But we are of the view that the court may act if there is a respondent within reach of its process who has custody of the petitioner. As Judge Cooley stated in *In the Matter of Samuel W. Jackson*, 15 Mich. 417, 439-440:
>
> > The important fact to be observed in regard to the mode of precedure upon this wrif is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent.

In *People* v. *New York Asylum*, 57 App. Div. (N. Y.) 383, the court said:

> We are not at all in doubt as to the rules of law applicable to cases of this kind, and there is no diversion of opinion in the court as to those rules. If the defendant in proceedings for a writ of habeas corpus has the custody or control of the person whose release is sought, so that it is possible for him to obey the order of the court with respect to that person, the court has jurisdiction not only to issue the writ, but to make a deter-

> mination in the matter and to require the delivery of such person; and this can be done, although it appears that the person whose release is sought is without the State . . . Section 2015 of the Code of Civil Procedure provides that a person imprisoned or restrained of his liberty "within the State" is entitled to a writ of habeas corpus. That has been extended by the courts, and properly so, to authorize the court to require the release of a person who is not within the State if the defendant to whom the writ is addressed has the power to produce him and subject him to the power of the court.
>
> Even if it should appear in the petition for the writ that the person whose release is sought is without the State, nevertheless, the court has jurisdiction to issue the writ if the facts show that the person to whom it is directed may have the control of the person confined, or may be able to obey the command of the court by producing him. In such a case when it appears that the person to whom the writ is directed may be able to produce the imprisoned person the writ ought to issue, and if for any reason the defendant is not able to obey it that fact should be made to appear by the return or the proof, and when it does appear, and not until then, should the writ be vacated.

There are other cases to the same effect. See *Ex Parte Anderson,* 121 English Reports 525; *Carus Wilson's Case,* 115 English Reports 759; *Sanders* v. *Allen,* 100 Fed. 2d, 717 (D. C.); *In Re Jackson,* 15 Mich. 417; *People ex rel. Dunlap* v. *N. Y. Asylum,* 58 App. Div. 133; *Queen* v. *Barnardo,* 24 Queens Bench 283; *U. S.* v. *Davis,* 5 Cranch C. C. 622; *Shaw* v. *Shaw,* 114 S. C. 300; *Rivers* v. *Mitchell,* 57 Iowa 193; Dissenting opinion, Mr. Justice Rutledge, joined in by Mr. Justice Black and Mr. Justice Murphy, in *Ahrens* v. *Clark,* 68 Supreme Ct. 1443; *Crowell* v. *Crowell,* 190 Ga. 501; *Emerson* v. *Guthner,* 108 Pac. 2nd 866.

In *Ex Parte McCardle,* 6 Wall. 319, 325-326, Chief Justice

Chase, referring to the Constitutional provision and Congressional enactments relating to habeas corpus, said:

> This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the national Constitution, treaties or laws. It is impossible to widen this jurisdiction.

This Court has held on many occasions that there may be no privation of the right to obtain the writ because of technicalities or other forms of legal niceties. *Bowen* v. *Johnson,* 306 U. S. 19; *Price* v. *Johnson,* 334 U. S. 266; *Wade* v. *Mayo,* 68 S. Ct. 1270.

Unless it be held that jurisdiction is vested in the District Court, petitioners and all other persons, whether they be nationals of a foreign nation or nations or citizens of the United States, would be without redress. See *Ex Parte Betz et al.,* 329 U. S. 672. Such a result was never within the contemplation of the United States Constitution, Article I, Section 9, Clause 2, and statutes implementing it.

Basically habeas corpus as it existed at common law may not be abridged by Congressional enactment or by judicial pronouncement for the reason that it is guaranteed by the United States Constitution.

This Court was of the opinion that the questions presented in the *Eisentrager* case involving a United States Military Commission sitting in China were so important as to require the granting of Certiorari. (339 U. S. 763, 767; 338 U. S. 877). The questions raised under the proceedings at Nurnberg and the proceedings at Dachau are fully as important and Certiorari should be granted in this case in order that these important questions might be settled in the public and political interests of the United States.

The case of *Flick* v. *Johnson,* 85 App. D. C. 70, 174 F. (2d) 893, on the point under discussion rather than supporting the actions of the court below is in our favor. The *Flick* case holds (174 F. (2d) 983, at page 984) that:

> Germans in military custody in the American zone of occupation in Germany, serving sentences of a United States Military Commission, and thus in custody under or by color of the authority of the United States (28 U.S.C.A. 2241, formerly 28 U.S.C.A. 451, 452, 453) may sue for the writ in the District of Columbia, naming as respondents officials at the seat of Government, through whose direction the actual jailer may be required to act.

III

The Nurnberg proceedings involving petitioners, Oswald Pohl, Erich Naumann, Paul Blobel, Werner Braune and Otto Ohlendorf, held pursuant to United States Military Government Ordinance No. 7, were conducted in such a manner that the Tribunals lost jurisdiction over petitioners. A full description of the nature and character of the proceedings at Nurnberg is discussed earlier in this petition in The Summary Statement. A reading of that statement will demonstrate that the proceedings at Nurnberg were such a departure from recognized courses of judicial procedure as they are applicable to United States Military Courts as to oust those Tribunals of jurisdiction. It has been conceded by one of the United States Military Tribunals at Nurnberg that if the Tribunals are United States Military Tribunals they have been illegally constituted and have proceeded illegally.

The five petitioners who were tried at Nurnberg were at the time of their capture all members of the military forces of Germany. As such their trials were governed by Articles 12 and 14 of the Articles of War. Article 14 specifically provides that General Courts-Martial have juris-

diction to charge prisoners of war *for military offenses* and for offenses of a civil nature. J.A.G. 38326, Dec. 27, 1917; Bulletin No. 75 WD, Dec. 31, 1917, page 6. General Courts-Martial are required by the Manual for Courts-Martial of the United States Army to consist of at least five officers. Chapter II, 4b. Moreover, in no case shall an officer be tried by officers inferior to him in rank. Chapter II, 4c. Ordinary rules of evidence, including rules forbidding the use of hearsay evidence, apply to General Courts-Martial.

These basic principles should have controlled the conduct of the United States Military Courts at Nurnberg. In violation of these specific provisions of the Articles of War, the Commanding General for the Theater issued unilaterally an ordinance designated as United States Military Government Ordinance No. 7, which attempts to establish United States Military Tribunals at Nurnberg each composed of three American Judges appointed by the Commander from civilian life. This ordinance attempts to set up as war crimes those acts defined as crimes in the London Agreement and Charter and in Control Council Law No. 10. Further, the Articles of War require that each prisoner tried be represented by American counsel. Ordinance No. 7 abolishes this right and substitutes the right to have counsel who are authorized to practise in the residence of the defendant. The Ordinance further abolished the rules of evidence and permitted the Tribunal to receive any "evidence" which the Tribunal thought had probative value, including numerous types of hearsay evidence, including documentary hearsay evidence. Interrogation methods, the depriving of the accused of all rights of counsel before trial, the blocking of all monies of each accused so that they could not be used to pay for his expenses or for the expenses of the obtaining of the necessary evidence for his defense, all violated the Constitution, treaties and laws of the United States.[6] The Tribunals at

Nurnberg, therefore, being pure United States Military Tribunals, should have been constituted as General Courts-Martial. Their procedures were such a departure from due process of law as guaranteed by the law as to oust those Tribunals of jurisdiction over petitioners. The sentences of death imposed by such proceedings are illegal.

All of these and other important questions are raised by the petitions below. Assuming that we are correct and that the United States District Court for the District of Columbia had jurisdiction over the petitions, full hearings should have been had, the facts developed and judgments rendered only after such hearings. That the questions involved in the Nurnberg proceedings are important is borne out by many actions taken by this Court in the past. Original petitions were filed with this Court during the October 1948 Term, relating to the Nurnberg proceedings. (Nos. 501, 507, 515, 517, 521 and 529 Misc.). On May 2, 1949 this Court treated the petitions as Motions for Leave to File Petitions and Original Writs of Habeas Corpus and denied them *by an equally divided court.* (336 U. S. 964). That the questions raised are important seems clear from this equal division of the Court. Moreover, the questions raised pertaining to Nurnberg are even more important than the questions raised as to the proceedings involved in the *Eisentrager* case. Under such circumstances the Writs should be granted and important questions here involved, which have not been, should be settled by this Court in the public interest and in the political interest of the United States.

IV

The death sentences imposed on petitioners, Schallermair and Schmidt, are illegal. No issue is presented on the

[6] Deprivation of counsel ousted the Tribunals of jurisdiction. *Johnson v. Zerbst,* 304 U. S. 458, 465-469.

character of the proceedings at Dachau. The Commissions there sitting were American. This is conceded by the Solicitor General. As we pointed out in our Summary Statement, the procedures required by The Articles of War, set up to guarantee a fair and impartial trial to anyone accused of a war crime, were ignored and flagrantly violated at Dachau.

We have shown how the Manual of Courts-Martial forbids the use of hearsay. It states: "Hearsay is not evidence." In violation of this binding rule controlling trials by United States Courts-Martial, Directives were issued by "Headquarters, European Command" requiring "Such evidence shall be admitted * * * as * * * has probative value." As American officers were reluctant to follow such an illegal provision, particularly in capital cases, "Headquarters, European Command," issued a "Guide to Procedure in Military Government Courts." Paragraph 9 thereof "officially" ordered:

> "Rule 12 does not incorporate the rules of evidence of British or American Courts or Courts-Martial * * * Hearsay evidence, including the statement of a witness not produced, is thus admissible * * *"

Thus the bars were down. The purest hearsay was admitted in the Schallermair and Schmidt cases. *Death sentences were imposed on petitioners based on hearsay.* The aspect of the Dachau cases is covered in our Summary Statement.

It is Hornbook law that convictions based on hearsay cannot stand under American law. 31 C. J. S. 192, 193, 194. Hundreds of cases are gathered in the notes to these Sections of C. J. S. including many decisions of this Court and other federal Courts. To cite and quote these cases would unduly lengthen this petition.

The reason underlying the rejection of hearsay by Amer-

ican Courts, including American Military Courts, is well stated in The Manual of Courts-Martial (ignored and violated at Dachau) p. 155:

> "Underlying the hearsay rule is the principle that the testimony of witnesses, to be of value, must be taken in court so that the witnesses may be sworn, cross-examined, confronted by the accused and observed by the court."

The so-called "facts" upon which petitioners were convicted at Dachau based upon hearsay have been completely destroyed and shown to be wrong by newly discovered evidence. This evidence is described in our Summary Statement. Justice requires in such cases the granting of new trials.

Pre-trial procedures, interrogations, mistreatment and similar abuses of "due process" render the Dachau sentences untenable.

In Schmidt's case a further grievous error is described in our Summary Statement.

Even under the "directives" controlling the Dachau cases, accused persons (Par. IV, Regulations Governing Military Government Courts) had the right to be present throughout his trial before the trying Military Court, to testify in his defense and to have questions put to adverse witnesses. Schmidt was denied these rights.

Schmidt had been severely mistreated before his trial at the Interrogation Center at Oberursel. His wounds became infected. Blood-poisoning set in and Schmidt became progressively worse. Sickness impaired his mind. Purulent abscesses set in. He was repeatedly operated. Poisoning even spread to his testicles. Protala inflammation followed. More operations were necessary. A mental collapse followed. Schmidt during these disabling illnesses attempted to attend his trial. It became evident

he could not do this. His counsel asked a separate trial for Schmidt at a time when he would be able to attend such a trial and to testify in his defense. *This request was denied by the Tribunal.* Schmidt missed 90 days of trial. During his trial he spent 40 days in the hospital. He had no chance to confront witnesses and was too ill even to testify in his own defense. On hearsay testimony received during his forced absence from his trial he is now sentenced to death. Schmidt was only an Adjutant. He killed no one. He could not change conditions at Buchenwald. Since his trial every "fact" upon which his death sentence was based has been shown by newly discovered evidence to be incorrect and unfounded.

No wonder the Minister of Justice for Western Germany protests his execution on the grounds that "fundamental principles of a due procedure of justice" were denied Schmidt. How right the Minister of Justice is in this contention is shown by American law. Again we say the principle involved is one of Hornbook law. As 23 C. J. S. Sec. 973, pp. 303, 304 states, the controlling law is:

> "• • • under constitutional • • • provisions to that effect and at common law, an accused charged with a felony is entitled to be present at every stage of the trial, or at least when any important or substantive step is taken.
>
> While the rule is regarded in most jurisdictions as essentially for the benefit of the accused, it has been held in other jurisdictions that the rule is for the benefit of the state as well as the accused, and that the accused's presence during the trial is essential to the jurisdiction of the Court."

In capital cases, however, such presence is to the state's interest as well as the accused and the accused must be present during the trial. His absence deprives the court of jurisdiction. Numerous cases are gathered in the notes

to 23 C. J. S. Secs. 973, 974, universally supporting this principle.

The reason for the rule is stated by the Court in *Noell* v. *Commonwealth*, 115 S. E. (Va.) 679, 681, as follows:

> "The public has an interest in every case involving the life or liberty of a citizen, and both in England and in this country it has long been recognized as a settled rule of the common law, based as well upon public policy as upon the interest of the accused, that his continuous presence, from arraignment to sentence, is an essential part of the process of law . . . without which the courts have no jurisdiction to pronounce judgment upon him."

Thus, the prosecution of Schmidt offends against the most fundamental principles underlying American criminal jurisprudence. It offends against basic human rights. Justice requires that his sentence be vacated and a real and genuine trial afforded him.

V

Involved in all seven cases below is a fundamental Constitutional question of first importance, which has not been, but which must be settled in the interests of justice and of the United States.

As we have shown, the actual state of war between the United States and Germany has ended. By executive agreements, of the character of the London Charter executed by Mr. Justice Jackson for the United States, the United States has, with Great Britain and France, established a Federal Government for Western Germany. By agreement with the United States a Constitution has been adopted by Germany. It is known as the Bonn Constitution.

The provisions of this Constitution have been accepted and approved by the United States. (Law No. 1, Official Gazette of the Allied High Commission). This inter-

national executive compact is executed on behalf of the United States by High Commissioner McCloy. This compact provides that the basic law of the new Federal Republic of Germany is now in effect and that Government of Western Germany is "established." By the Occupation Statute the Allies reserve:

> control of the care and treatment in *German* prisons of persons charged before or sentenced by the courts or tribunals of the occupying Powers or occupation authorities; over the carrying out of sentences imposed on them; and over questions of amnesty, pardon or release in relation to them.

The Bonn Constitution, a compact agreed to by the United States and now operative and in force in all of Western Germany, specifically abolishes capital punishment. There are no exceptions stated in this abolition. Basic rights are specifically guaranteed all German nationals by that constitution and they are guaranteed due process of law and a trial in ordinary, as distinguished from *extraordinary,* courts. (See Article 2, Article 101 and Article 102 of the Basic Law for the Federal Republic of Germany, Military Government Gazette, 10-9-49, Issue 35, Part 2b-1).

Petitioners assert that the compact under which the Federal Republic of Germany was established and the Bonn Constitution enacted effectively abolished all capital punishment in the Western Zone of Germany. The so-called "control" reserved over prisoners detained in *German* prisons by the Allies does not specifically reserve the right to carry out death sentences. Moreover, it only reserves control over persons sentenced by Occupation Courts in *German* prisons. Petitioners are not in a German prison. They are detained in the United States Military prison at Landsberg. This prison is not German but is American and is controlled exclusively by American Military authorities.

Petitioners assert that the compact existing between Western Germany and the United States has terminated the right of the United States to carry out any death sentences in Western Germany and that by the terms of that compact all death sentences have automatically been commuted to life sentences.

This situation presents questions of substance relating to an international compact executed on behalf of the United States by the Executive Branch of our Government. The questions proposed are of first impression, have not been decided by this Court and should be decided promptly in the public interest. The reason being if the petitioners' contentions, which are basically the contentions of the Federal Republic of Germany as well are correct, then American military personnel in Germany lack legal authority to carry out the proposed executions of petitioners. This question must be settled and it should be settled now in order that the Executive Branch of the Government may know whether it has the legal right to hang petitioners. If such authority be lacking and the question is not determined now but is later determined, as it well may be, American personnel carrying out death sentences may find themselves in just as difficult a position legally as petitioners, who have been held guilty of being "war criminals" because they obeyed what later turned out to be "illegal military orders".

The establishment of a Federal Republic for Germany and its recognition by the United States, as Mr. Justice Frankfurter in his concurring opinion in *United States* v. *Pink*, 315 U. S. 203, 241, held, "normally involves removal of areas of friction." Mr. Justice Frankfurter also points out that the power to establish such normal relations through the Executive Department with a foreign country is "indisputable * * * It is the assertion of national power

directed toward safeguarding and promoting our interests and those of civilization."

The decision in the *Pink* case clearly establishes that once recognition is given a foreign country by the Executive Branch of our Government and property rights and personal rights arise under the relations existing between the United States and such recognized country, Federal questions are presented involving in effect "treaties" which come for interpretation within the jurisdiction of the Federal courts, including this Court. This Court thought that the questions arising out of the relations existing between the United States and Russia to be of such importance as to warrant the granting of Certiorari in the *Pink* case. Only property rights were involved in the *Pink* case. The lives of seven persons are now involved and the legality of their proposed executions depends upon an interpretation of the present executive compact existing between the United States and Germany. In such circumstances Certiorari is truly warranted.

That Certiorari is justified in this case is fully established by the opinion of this Court in *United States* v. *Belmont*, 301 U. S. 324. In the *Belmont* case this Court held a treaty is merely "a compact made between two or more independent nations, with a view to public welfare" citing *Altman & Co.* v. *United States*, 224 U. S. 583, 600. This Court further pointed out that international compact, that is, a treaty, does not always require the participation of the Senate (p. 330). In discussing this matter this Court said (p. 331):

> "We held that although this might not be a treaty requiring ratification by the Senate, it was a compact negotiated and proclaimed under the authority of the President and as such was a treaty * * * the construction of which might be reviewed upon direct appeal to this Court."

This Court further said in the *Belmont* case (p. 331) that the provisions of Clause 2, Article 6 of the Constitution giving supremacy to treaties is applicable to "all international compacts and agreements • • • on international affairs • • •." This Court thereupon held that international compacts made by political departments of the Government are binding and that recognition by the Executive Department "is retroactive and validates all actions and conduct of the Government so recognized."

Under the facts presented by the Petitions below and here presented an international compact governing these petitioners is before this Court for construction. The questions posed under this compact are of first importance, are material to the continuance of good relations between the United States and Western Germany and should be settled by this Court in the public interest. The interest of the Federal Government for Western Germany is made clear by a public press announcement which it has made pertaining to the death sentences here involved which we incorporate in this Petition for the information of the Court. It reads as follows:

> The Federal Press Office makes the following announcement:
>
> The Bundeskanzler (Federal Chancelor) has received in these days telegrams and letters from all parts of Germany requesting him to make efforts with the view of preventing the Landsberg death sentences from being carried out. Moreover he has received letters requesting him for information regarding the steps taken by the Bundeskanzler, the Bundesregierung and the Bundestag. To this the following is hereby stated:
>
> 1.) In the course of the year 1950 the Bundeskanzler has several times urgently requested the American High Commissioner in writing and orally to refrain

from executing the 28 death sentences rendered in the trials at Nuremberg and Dachau insofar as they have not yet been executed. These requests have been made on the ground that the Basic Law of the Federal Republic of Germany does not know capital punishment and that the execution of the sentences several years after they had been rendered would be repugnant to the feeling of justice.

2.) A representative of the Bundesregierung submitted to General Handy of the EUCOM in the beginning of January 1951 in a lengthy conference the same request. He pointed out to Gen. Handy that the procedure applied in the Dachau trials gave rise to considerable objections.

3.) In a statement before the German Bundestag on November 14, 1950, the Federal Minister of Justice, replying to an interpellation from all parties except the Communists, set out publicly the efforts made by the Bundesregierung in order to obviate the carrying out of the death sentences. On that occasion, he emphasized that notwithstanding the extremely grave crimes with which the prisoners were charged all sentences were based on exceptional laws (Sondergesetze) and that there had been no possibility of having the sentences reviewed by a tribunal.

4.) In a letter dated January 16, 1951, the Bundespraesident (President of the Federal Republic) requested Mr. McCloy and Gen. Handy to refrain from further executions at Landsberg.

5.) A delegation of members of the Bundestag headed by the President of the Bundestag submitted to Mr. McCloy emphatically the request of the elected representatives of the German people to refrain from carrying out the death sentences.

6.) The Federal Government learned with satisfaction from the statements made by Mr. McCloy and Gen. Handy on January 31, 1951, that in 21 of the 28 pending cases death sentences were commuted in sentences of imprisonment. In 7 cases American officials took the position that in view of the grave nature of

the crimes it is not possible to refrain from carrying out the death sentences. In reply to the issues raised by the highest representatives of The Federal Republic which were based on considerations of principle regarding capital punishment, the American High Commissioner observed that the death sentences had been rendered prior to the becoming effective of the Bonn Constitution (Grundgesetz), and that most of the crimes had been committed by the prisoners outside Germany and had been perpetrated on non-Germans, moreover, that the time between the rendering and the execution of the death sentences had been absorbed by consideration made in the interest of the prisoners.

7.) Even after January 1951 the Federal Government continued its efforts to obviate the carrying-out of the death sentences. An official of the Ministry of Justice once more called General Handy's attention to the fact that there was cause for considerable objection against the proceedings which resulted in the two now confirmed death sentences of the Dachau trials. To these observations was attached the request to refrain from the execution. A spokesman of the Ministry of Justice called the attention of the legal advisor of the American High Commissioner to the fact that in some cases the reasons given for the confirmation of the sentences were in conflict partly with the sentences themselves, partly with the official minutes, and partly with the facts stated by the International Military Tribunal at Nuremberg. Hence in these cases too a review was requested. In a telegram, dated February 15, 1951, the Bundeskanzler requested the High Commissioner to give thorough consideration to those points of view and to suspend the carrying out of the sentences, pending the completion of such consideration.

* * * * * * *."

The great public questions raised by petitioners in these cases, many of which have been raised by the Government

of Western Germany, are of such importance as to require in the public interest that Certiorari issue and that this Honorable Court decide such questions.

Conclusion

We cannot close this Petition without reminding this Court that the political situation existing between the United States and Germany has been changed since the trials in petitioners' cases were commenced. The United States, together with Germany and other Western Powers, are seeking to create a unified military front throughout the world, and particularly in Western Europe, to prevent aggression. In view of the protest of the Western German Government against the carrying out of the proposed executions of petitioners, and in view of the serious questions involved in the proposed carrying out of such executions, after the recognition of the United States of Germany and the enactment of its Constitution abolishing capital punishment, it is respectfully submitted that this Petition for Certiorari to bring before this Court the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit, should be granted in this consolidated case.

WARREN E. MAGEE,
Attorney for Petitioners,
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Washington, D. C.

March 28, 1951.

In the Supreme Court of the United States

OCTOBER TERM, 1950

No.

OSWALD POHL, ERICH NAUMANN, GEORG SHALLERMAIR, PAUL BLOBEL, WERNER BRAUNE, OTTO OHLENDORF AND HANS TH. SCHMIDT, PETITIONERS,

vs.

DEAN ACHESON, SECRETARY OF STATE; SECRETARY OF DEFENSE GEORGE C. MARSHALL; SECRETARY OF THE ARMY, FRANK PACE; ATTORNEY GENERAL, J. HOWARD MCGRATH; JUDGE ADVOCATE GENERAL, THOMAS H. GREEN; PROVOST MARSHAL, JOHN DOE; HIGH COMMISSIONER, JOHN J. MCCLOY; COMMANDING GENERAL OF THE EUROPEAN COMMAND, THOMAS HANDY; COLONEL W. R. GRAHAM AS PRISON OFFICER OF WAR CRIMES PRISON NO. 1 AT LANDSBERG, GERMANY, RESPONDENTS

MOTION TO DISPENSE WITH PRINTING OF RECORD ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Come now petitioners, Oswald Pohl, Erich Naumann, Georg Schallermair, Paul Blobel, Werner Braune, Otto

Ohlendorf and Hans Th. Schmidt, by their attorney, and respectfully move this Honorable Court to permit petitioners to proceed with their Petition for Writ of Certiorari seeking review of the decision and judgment of the court below without being required to print the record in said cause. Judgment was entered below on February 19, 1951 in the United States Court of Appeals for the District of Columbia Circuit. This Court has granted petitioners thirty days from February 26 within which to file their Petition for Writ of Certiorari. The record was not printed in the court below and the original record of the court below has now been made the transcript of record in the pending case, pursuant to an Order duly obtained from the court below. Petitioners feel in view of the time limits placed upon them and the lack of funds that the interests of justice require that this Motion should be granted and they be permitted to file this, their Petition for Writ of Certiorari, without being required to print the record involved in this case.

WHEREFORE, the premises having been duly considered, it is respectfully prayed that leave be granted for petitioners to file a Petition for Writ of Certiorari on the transcript as embodied in the original record as certified to by this Honorable Court by the Clerk of the United States Court of Appeals for the District of Columbia Circuit and as supplemented by the stenographic Transcript of Proceedings held in the court below on February 19, 1951.

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Attorney for Petitioners.

March 28, 1951.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 643

OSWALD POHL, ERICH NAUMANN, GEORG SCHALLERMAIR, PAUL BLOBEL, WERNER BRAUNE, OTTO OHLENDORF, AND HANS TH. SCHMIDT, PETITIONERS

v.

DEAN ACHESON, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Neither the District Court nor the Court of Appeals wrote opinions.

JURISDICTION

The judgment of the Court of Appeals was entered on February 19, 1951 (R.). The petition for a writ of certiorari was filed on March 28, 1951. The jurisdiction of this Court is invoked under 28 U.S.C., sec. 1254.

QUESTION PRESENTED

Whether the courts below erred in promptly dismissing for lack of jurisdiction petitions for writs of habeas corpus challenging the detention of German nationals by American authorities in the United States Zone of Germany pursuant to convictions for war crimes, in accordance with this Court's decision in *Johnson* v. *Eisentrager,* 339 U.S. 763.

ORDERS INVOLVED

The text of Control Council Law No. 10 and U.S. Military Government Ordinance No. 7 is set forth in the Appendices to this brief, *infra,* pp. 29-36, 37-47.

STATEMENT

Pohl, Blobel, Braune, Naumann and Ohlendorf were tried and convicted on charges of war crimes and were sentenced to death by United States Military Tribunals established in accordance with Control Council Law No. 10 and United States Military Government Ordinance No. 7 (Appendix A, *infra,* p. 29, Appendix B, *infra,* p. 37).[1] Schallermair and Schmidt were tried and convicted on charges of war crimes and were sentenced to death by United States military commission. Each of the petitioners is presently confined in Landsberg Prison in the United States Zone of Occupied Germany. Each of the petitioners is a German national and, therefore, an alien enemy.

[1] These tribunals were of the type involved in *Flick* v. *Johnson,* 174 F. 2d 983 (C.A. D.C.), certiorari denied, 338 U.S. 879.

The findings upon which the petitioners were convicted and sentenced may be summarized as follows: Ohlendorf was an S. S. major general commanding a unit formed specifically to liquidate civilians in conquered territories for political reasons, without investigation and without trial. The trial court stated "Ohlendorf . . . declared that . . . his Einsatzgruppe killed 90,000 people," and this was confirmed by other testimony. Naumann was an S. S. brigadier general commanding another extermination group. During his period of command, thousands of Jews and gypsies were executed by his unit, one of his reports showing 3,539 killed from March 6 to March 30, 1942. Blobel was an S. S. colonel commanding a sub-group of the extermination unit. He was found responsible for the death of sixty thousand people in a period of six months, 33,000 Jews being killed in a two-day massacre in September 1941. Braune, an S. S. lieutenant colonel, also commanded a sub-group. Among other massacres, he was found responsible for the murder of over 700 persons, men, women and children, between the beginning of December and Christmas 1941. He testified: "It took place under my responsibility. I was at the place of execution with Mr. Ohlendorf and there we convinced ourselves that the execution took place according to the doctrines laid down by Mr. Ohlendorf." Pohl was head of the office which had charge of the administration of all concentration

camps. The trial court also found him responsible, among other things, for the destruction of the Warsaw ghetto, including the deportation or extermination of more than 56,000 Jews. He personally selected prisoners for medical experiment. His organization played a major role in the operation by which all Jews in occupied areas were rounded up and forced to take their belongings to concentration camps, such as Auschwitz, where they had to turn in their belongings before entering the gas chamber.[2] Both Schallermair and Schmidt were convicted of causing the death of concentration camp prisoners.

The convictions of Pohl in November 1947, and Blobel, Braune, Naumann, and Ohlendorf in April 1948, were reviewed and confirmed, pursuant to Article XVII of U. S. Military Government Ordinance No. 7, by the United States Military Governor in March and April, 1949. Meanwhile, during the October Term, 1948, petitions were filed with this Court by Pohl (Nos. 501 and 507 Misc.), Blobel (No. 515 Misc.), Braune (No. 517 Misc.), Naumann (No. 521 Misc.) and Ohlendorf (No. 529 Misc.). The Court treated these petitions

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[2] The charges against Pohl and a condensation of the evidence adduced at his trial are printed in volume V of Trials of War Criminals before the Nurnberg Military Tribunals under Control Council Law No. 10, pp. 195-1254; the charges against Ohlendorf, Blobel, Braune and Naumann and a condensation of the evidence adduced at their trial are printed in volume IV of the same series under the name of "The Einsatzgruppen Case."

as motions for leave to file petitions for original writs of habeas corpus, and as such they were denied by an equally divided Court. 336 U. S. 964. Moreover, various individual or joint petitions were filed in the District Court for the District of Columbia in 1949 by or on behalf of Pohl, Blobel, Braune, Naumann and Ohlendorf. With one exception, these petitions were rejected by the Clerk of the District Court for lack of filing fees, but not until notice of the requirement of fees had been given and many months had passed without the fees being paid. See *Nash on Behalf of Takeshi Hashimoto* v. *MacArthur,* 184 F. 2d 606 (C.A.D.C.). Ohlendorf filed a petition, accompanied by a filing fee, which was denied by Judge Holtzoff on November 21, 1950, and the time for taking an appeal has elapsed.

In 1950, John J. McCloy, United States High Commissioner for Germany, established the Advisory Board on Clemency for War Criminals to consider the petitions for clemency filed by or on behalf of the defendants who were convicted of war crimes by military tribunals established in pursuance of Control Council Law No. 10 and U. S. Military Government Ordinance No. 7. The Board consisted of the Hon. David W. Peck, Presiding Justice, Appellate Division, First Department, New York Supreme Court, Chairman; Commissioner Frederick A. Moran, Chairman, New York Board of Parole; and Brigadier General Conrad

E. Snow, Assistant Legal Adviser, Department of State. Upon receipt of the Board's recommendations, the High Commissioner, on January 31, 1951, commuted ten death sentences to imprisonment, but confirmed the death sentences imposed upon Pohl, Blobel, Braune, Naumann and Ohlendorf.

The Deputy Theatre Judge Advocate, a War Crimes Board of Review and the Judge Advocate, European Command, reviewed the convictions of Schallermair and Schmidt and concurred in the sentences. The findings and sentences in the cases of Schallermair and Schmidt were finally approved by General Clay, as Commander in Chief, European Command, in 1948. This Court has denied two petitions filed with it by Schmidt, 336 U. S. 923, 339 U. S. 976, and one petition filed by Schallermair, 336 U. S. 922. On January 31, 1951, General Thomas T. Handy, Commander in Chief, European Command, announced that upon a clemency review of 13 war criminals sentenced to death by United States military commissions, he had commuted death sentences to life imprisonment in 11 cases, but had reaffirmed the death sentences in the cases of Schallermair and Schmidt.[3]

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[3] The petitioners appear to contend that their sentences did not become final until they were affirmed by the High Commissioner and General Handy on January 31, 1951, from which they suggest that they were allowed practically no time in which to seek relief. The fact is that the death sentences imposed upon the petitioners had been confirmed by the appropriate authority not later than April 1949. All subsequent proceedings were in the nature of gratuitous clemency reviews.

On February 12, 1951, each of the 7 petitioners filed with the District Court for the District of Columbia, a petition for a writ of habeas corpus challenging his detention in Landsberg Prison. On February 13, Judge Tamm entered an order dismissing all 7 petitions on the ground of lack of jurisdiction, citing *Johnson* v. *Eisentrager,* 339 U. S. 763. Upon appeal to the Court of Appeals for the District of Columbia, that court, on February 19, affirmed the judgments of the District Court dismissing the complaints, relying upon *Johnson* v. *Eisentrager, supra,* and *Flick* v. *Johnson,* 174 F. 2d 983, certiorari denied, 338 U.S. 879.

ARGUMENT

It is undisputed that each of the petitioners is a German national,[4] *i.e.,* an alien enemy, confined in the United States Zone of Germany pursuant to conviction for war crimes by tribunals sitting in Germany. Accordingly, we submit that the courts below correctly applied this Court's decision in *Johnson* v. *Eisentrager,* 339 U.S. 763, by dismissing the petitions for writs of habeas corpus for lack of jurisdiction.

1. In *Johnson* v. *Eisentrager,* this Court held that no court of the United States possesses jurisdiction to review in habeas corpus proceedings

[4] We pass over, as frivolous, Pohl's suggestion that he may have lost his citizenship under German law by reason of his crimes. No German law that would effect this is cited or has been discovered. On the contrary, Article 16 of the Bonn Constitution provides that "No one may be deprived of his German citizenship".

the legality of detention in occupied enemy territory, pursuant to conviction on charges of war crimes, of non-resident enemy aliens tried before a military tribunal sitting in occupied territory. That decision required dismissal of the present petitions.

2. The petitioners seek to avoid the *Eisentrager* rule by their contention that since the decision in that case in June 1950, the relationship between Germany and the United States has so changed that German nationals can no longer be regarded as enemy aliens in relation to the United States. In effect, they assert that a state of war no longer exists between the United States and Germany. They contend, therefore, that the *Eisentrager* rule denying habeas corpus jurisdiction in cases involving non-resident enemy aliens no longer applies to German nationals.

In 1947, in *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 116, in 1948, in *Woods* v. *Miller Co.*, 333 U. S. 138, 141-144, and in *Ludecke* v. *Watkins*, 335 U. S. 160, 166-170, this Court held that a state of war continued to exist between the United States and Germany for the purposes of important segments of our national law. *Johnson* v. *Eisentrager, supra,* decided in June 1950, necessarily assumed the continued existence of such a state of war.

This Court has repeatedly recognized that the termination of a state of war is a political act, rather than a fact to be determined upon evidence

adduced in a lawsuit. As recently as *Ludecke* v. *Watkins, supra,* at pp. 168-169, 170, it stated: " 'The state of war' may be terminated by treaty or legislation or Presidential proclamation. Whatever the mode, its termination is a political act. * * * The political branch of the Government has not brought the war with Germany to an end. On the contrary, it has proclaimed that 'a state of war still exists' ". Previously, in *In re Yamashita,* 327 U.S. 1, 12, this Court stated that "We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government."

The Executive branch of the Government considers that the state of war between the United States and Germany which began on December 11, 1941 (55 Stat. 796) continues to exist. This Court may take judicial notice of the fact that no treaty, statute or Presidential action has terminated the state of war with Germany. Moreover, armed forces of the United States continue to maintain a military occupation in the United States Zone of Germany.

Even if the existence of a state of war is to be determined as a litigation fact, the circumstances relied upon by the petitioners as showing that the state of war no longer existed between the United

States and Germany are clearly insufficient. Thus, they contend that the United States, the United Kingdom and France have established the Federal Republic (*i.e.*, the West Germany government sitting at Bonn) under a constitution approved by the United States and that the United States has "recognized" that government, that the German Foreign Office has been reestablished, that Germany is participating in the activities of various international organizations, that many Germans are studying in this country, and that economic agreements are being negotiated between the United States and the Federal Republic of Germany (Pet. pp. 54-57).

The United States, in conjunction with France and the United Kingdom, has taken a series of progressive steps towards establishing democratic self-rule in West Germany and restoring Germany to the family of nations. Thus, the three governments permitted the establishment of Federal and the continuance of previously established State governments in accordance with the Bonn Constitution which they approved. Since April 1949, the relationships between the Federal Republic and the three occupying powers have been governed by the Occupation Statute[5] which authorized the Federal Republic and the participating Laender to exercise powers of government, subject

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[5] The text of the Occupation Statute is set forth in 20 State Dept. Bull. 500.

to (1) a reservation of certain areas of governmental power, such as foreign affairs and control of war criminals, in the occupation authorities, (2) a general veto power in the occupation authorities, and (3) a reserved right of the occupying powers to resume any and all powers of government.[6] Moreover, as the economic and political reconstruction of western Europe has proceeded, the three occupying powers have found it desirable to permit and encourage the Federal Republic to participate in international organizations furthering such reconstruction. In March 1951, the Occupation Statute was amended to authorize the Federal Republic to reestablish a German Foreign Office and to exchange diplomatic representatives with other nations.[7] This grant of authority is subject to the reserved power of the occupying powers to resume any functions of government.

Most of these steps had been taken prior to this Court's decision in *Johnson* v. *Eisentrager, supra.* That all of them are consistent with the existence of a state of war is illustrated by the joint statement of the Foreign Ministers of France, the

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[6] Para. 3 of the Occupation Statute provides:

> * * * The occupation authorities, however, reserve the right, acting under instructions of their Governments, to resume, in whole or in part, the exercise of full authority if they consider that to do so is essential to security or to preserve democratic government in Germany or in pursuance of the international obligations of their governments. * * *

[7] The text of this amendment to the Occupation Statute appears in 24 State Dept. Bull. 443-448.

United Kingdom and the United States on September 19, 1950, which reads in part as follows:

> * * * Pending the unification of Germany, the three Governments consider the Government of the Federal Republic as the only German Government freely and legitimately constituted and therefore entitled to speak for Germany as the representative of the German people in international affairs.
>
> They reaffirm their desire, of which they have already given many proofs, to integrate the Federal Republic into the community of free nations. They are convinced that the overwhelming majority of the German people want to take part in building the European community, and in strengthening its common civilization. It appears to them that the time has now come to take a new step toward the attainment of these aims.
>
> In the spirit of the new relationship which they wish to establish with the Federal Republic, the three Governments have decided, as soon as action can be taken in all three countries in accordance with their respective constitutional requirements, to take the necessary steps in their domestic legislation to terminate the state of war with Germany.
>
> This action will not affect the rights and status of the three powers in Germany, which rest upon other bases. It will, however, create a firmer foundation for the developing structure of peaceful and friendly relationships and will remove disabilities to which German

> nationals are subject. It is hoped that other nations will find it possible to take similar action in accordance with their own constitutional practices.[8]

It is particularly significant that the three Foreign Ministers considered that, notwithstanding the relaxation of the occupation controls, a state of war still exists between their countries and Germany. The Foreign Ministers' reference to termination of the state of war was a statement of future intention—which has not yet been implemented.

Thus, the political branch of our Government, in conjunction with the governments of the United Kingdom and France, has affirmatively declared that the state of war with Germany continues. However, the petitioners finally contend that "In the field of International Law we have now come to understand that it is the actions of a nation, not formal declarations, that determine the factual international status existing between nations." To illustrate this contention, the petitioners suggest that in fact a state of war no longer exists between the United States and Germany and that, on the contrary, the United States is in a state of war with respect to Korea (Pet. p. 57). The contention simply overlooks the distinction between a cessation of hostilities and the termination of a state of war. *Ludecke* v. *Watkins, supra.* It also

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[8] 23 State Dept. Bull. 530-531.

illustrates why this Court has always treated determinations as to the beginning and termination of a state of war as political matters.

3. Under these circumstances, there is no basis for the petitioners' complaint that the prompt dismissal by the District Court of their petitions for writs of habeas corpus, and the prompt affirmance of that action by the Court of Appeals, constituted a denial of due process of law. It is the duty of the lower Federal courts to apply without delay the decisions of this Court. This Court's recent decision in *Johnson* v. *Eisentrager, supra,* required the dismissal below of the petitions. The petitioners' contention that a state of war no longer existed between the United States and Germany, thereby rendering the *Eisentrager* rule inapplicable, was frivolous on its face. Moreover, both of the courts below were aware of the previous petitions filed in the Federal courts by these petitioners.

There is no actual basis for petitioners' suggestion that the sentences of death imposed upon them were not "confirmed" until January 31, 1951, and that since the execution of the sentences was set for February 14, "This meant that all petitioners had only two weeks within which to prepare and file Petitions for Writs of Habeas Corpus under restrictions of jail confinement in Germany" (Pet. pp. 9-10). To the contrary, it is a fact that the death sentences imposed upon the petitioners were confirmed by the appropriate authority, *i.e.*,

became final, not later than April 1949. The review which has been had since April 1949 has been by way of clemency proceedings. Each of the petitioners has had from two to three years in which to exhaust any remedies which he believed to be available to him, and the record of the various petitions which they have filed in the Federal courts shows that they have been fully aware of that opportunity.

Under these circumstances, we think it is clear that the last-minute filing of these petitions for writs of habeas corpus was purely for purposes of delay. This characterization is further supported by the fact that the petitions do not present a single issue which could be determined in habeas corpus proceedings, as we shall show (*infra*, pp. 20-27). We urge, therefore, that the courts below acted properly in dismissing the petitions without delay, rather than allowing the proceedings to drag on for months—as desired by the petitioners (Pet. p. 14).

4. We have pointed out that a state of war still exists between the United States and Germany, with the result that *Johnson* v. *Eisentrager, supra,* required the courts below to dismiss for lack of jurisdiction the petitions for writs of habeas corpus filed by the petitioners. However, appropriate action is to be initiated in the near future, the time to be coordinated with the Governments of the United Kingdom and of France, in order to bring about the termination of the state of war

between the United States and Germany in accordance with the announcement of the Foreign Ministers on September 19, 1950 (*supra*, p. 12).[9] Accordingly, it may be of interest to discuss briefly the effect of a termination of the state of war upon the result reached in the *Eisentrager* case.

a. We contend that the status of the petitioners, for the purpose of obtaining judicial review in American courts of the acts of the United States armed forces and military government in Germany, would not be changed if the state of war between the United States and Germany should be terminated before the conclusion of this proceeding. Of course, no such proposition was directly determined in *Johnson* v. *Eisentrager*, *supra*, where it was not strictly necessary to the decision, but we agree with the dissenting justices in *Eisentrager* that the rationale of the Court's opinion denies American courts jurisdiction of claims such as this by former alien enemies "even after peace is officially declared" (339 U.S. at 796). In addition to its consideration of Eisentrager's status as a non-resident alien enemy at the time of his application for habeas corpus and of the Court's decision, the Court stressed the fact that he *had been* an alien enemy engaged abroad in the hostile service of a government at war with the

[9] Such action, if and when taken, will be in such form as not to affect the military occupation or the present authority of the occupying powers. Matters relating to war criminals would continue to be reserved to the occupation authorities.

United States, and as such had committed the war crimes for which he was subsequently tried and convicted (339 U.S., at 769, 775, 776, 778, and especially at 782-785). In our view, the status of the accused at the time they perpetrated their atrocities, and not their status at the time of filing suit in an American court, is decisive under the *Eisentrager* opinion.

Moreover, Germany, whether it be occupied enemy or friendly ally, remains foreign territory, beyond the confines of the territory of the United States. *Neely* v. *Henkel*, 180 U.S. 109, 119; *United States* v. *Spelar*, 338 U.S. 217, 219. "Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens * * *." *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 318; see also *In re Ross*, 140 U.S. 453, 464. Conversely, this Court said in the *Eisentrager* opinion, at page 771: "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." In the present case there is no claim that the petitioners have ever been or resided in the United States. We also rely upon, without repeating here, our argument in the *Eisentrager* case based upon *Ahrens* v. *Clark*, 335 U.S. 188. See the Government's Brief (Oct. Term 1946, No. 306), pp. 15-59.

b. Underlying the *Eisentrager* case as well as this is the problem of whether at any time present or former non-resident enemy aliens can litigate in American courts as to the validity of the acts of American forces and officials done during the course of waging war and conducting military occupation in an enemy country. It should be emphasized that the conduct of war and military occupation involve an infinite variety of problems and relationships between our armed forces and officials and the inhabitants of the hostile territory. These include—to mention only a few in addition to the punishment of war crimes—requisitions, billeting, dismantling of fortifications and war industries, the imposition of security measures, the reestablishment of essential services, the removal from public office of leading Nazis, the use of occupied territory as a base for further military operations (as in Germany 1944-1945), and the restoration of plundered property. Moreover, these problems must be solved against a background of unfamiliar legal and political systems, the disruption of war, language difficulties and a hostile local population. If, after the termination of a state of war, all the possible claims of injury or illegality arising out of these necessary activities can be challenged in the American courts, then there will be presented a variety of actions against American officials for damages ranging from negli-

gence and breach of contract to theft, false imprisonment and wrongful death.

We believe that the circumstances surrounding the trial of war crimes are such as to require their treatment, *in relation to the American judicial system,* as political questions. Regardless of the continued existence of a state of war, it would remain true that at the time of their alleged crimes, as well as at the time of their apprehension, trial, conviction and sentence, these petitioners were alien enemies. Their crimes were committed abroad. They were apprehended and tried abroad, and they are confined abroad. They have never been in this country. The result is that no phase of these cases has taken place in the milieu to which American law is adapted. The geographical remoteness of the situs of crime, trial, and detention would result in the greatest difficulty in bringing defendants and witnesses to a hearing in an American courtroom—a difficulty which will increase with the passage of time. Yet, if the termination of the state of war with Germany is to throw open American courts to every *inhabitant* of Germany who desires to challenge the acts of American authorities in Germany, the District Court for the District of Columbia will probably be asked to review a large number of war crimes cases in which the sentence was imprisonment. Moreover, many other acts of the occupation authorities will become the subject of litigation.

In addition, so long as American authority is maintained in Germany, even though the state of war may have been terminated for many purposes, it is essential for the reasons stated in *Johnson* v. *Eisentrager* that the United States act solely through its political and military representatives. Their position would become intolerable if their acts could be challenged in the American courts in suits for writs of habeas corpus, damages, injunctions and the like. Also, the crucial geographical relationship of Germany to existing world tensions is well known. The termination of a state of war between the United States and Germany will relieve neither Americans nor West Germans from the burden of dealing with such matters as espionage and sabotage directed against both. Thus, the basic considerations of security which underlie the *Eisentrager* rule are likely to be present in West Germany for a long time—even though the state of war was terminated today.

We urge, therefore, that the non-reviewability of the petitioners' convictions for war crimes ultimately depends upon their status and relationship to the United States at the time of offense, trial and conviction, rather than upon the continued existence of a state of war.

5. In any event, we believe that affirmance of the judgment below is also required on the ground, not considered by the courts below, that the petitions for writs of habeas corpus do not present any issue

which could be determined in habeas corpus proceedings.

Even if Federal courts possessed habeas corpus jurisdiction in these cases (which we deny), the scope of review would certainly be no greater than in ordinary court-martial cases. The proceedings of courts-martial and other military tribunals may be reviewed only to ascertain whether the tribunal was lawfully established, whether it had jurisdiction of the person accused and the offense charged, and whether it imposed a sentence within its powers. "The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision." *Hiatt* v. *Brown,* 339 U. S. 103, 111; *In re Yamashita,* 327 U. S. 1, 8, 9.

The power of the President and his military commanders to establish military tribunals for the trial of war crimes is undisputed. *Ex parte Quirin,* 317 U. S. 1; *In re Yamashita, supra; Hirota* v. *MacArthur,* 338 U. S. 197. The petitioners Schallermair and Schmidt were tried by United States military commissions, while Pohl, Ohlendorf, Braune, Blobel and Naumann were tried by American Military Tribunals established by U.S. Military Government Ordinance No. 7 to implement Control Council Law No. 10. The only challenge to the jurisdiction of the military commissions and tribunals here involved is the claim that the petitioners were entitled, under the Geneva Prisoner

of War Conventions of 1929 and 1949, to be tried by court-martial in accordance with the Articles of War (Pet., pp. 50, 64-66).[10] Assuming that each of the petitioners enjoys the status of a prisoner of war, the provisions of the 1929 Prisoner of War Convention relied upon by the petitioners do not apply to the pre-capture offenses for which they were tried. *In re Yamashita, supra,* at p. 14; *Johnson* v. *Eisentrager, supra,* at pp. 789-790. While it is true that a contrary rule is stated in the Prisoner of War Convention of 1949, the 1949 Convention, which is in the form of a treaty, has not been ratified by the United States and, therefore, even if it could be applied retroactively to these cases, is in no way controlling.

It follows that, since the Articles of War do not apply, such matters as the petitioners' complaint that hearsay and opinion evidence was received against them, their allegations of innocence and as to the weight of the evidence, and Schmidt's alleged absence due to illness from part of his trial, do not present issues reviewable in habeas corpus proceedings. *In re Yamashita, supra,* at pp. 4, 11-15, 18-23; *Hiatt* v. *Brown,* 339 U.S. 103, 110.

[10] Petitioners Schmidt and Schallermair do not otherwise challenge the jurisdiction of American military commissions to try them on charges of mistreating concentration camp prisoners. The other five petitioners do not otherwise challenge the jurisdiction of American Military Tribunals to try them on charges of war crimes and crimes against humanity as defined in Article II of Control Council Law No. 10. Control Council Law No. 10 was the supreme law for Germans in Germany. *Flick* v. *Johnson,* 174 F. 2d 983 (C. A. D. C.), certiorari denied, 338 U. S. 879.

All of the petitioners contend that the death sentences imposed upon them may not be carried out because, subsequent to their trials, there became effective the Constitution of the Federal Republic of Germany (known as the Bonn Constitution), Article 102 of which provides that "The death sentence shall be abolished." (Pet., pp. 70-76). There are two answers to this contention. First, the United States authorities in Germany are not bound by German domestic law. *Coleman* v. *Tennessee,* 97 U. S. 509; II Oppenheim's *International Law,* rev. 6th ed. by Lauterpacht, 1944, p. 342. Secondly, in the Occupation Statute by which the United States, France and the United Kingdom authorized German authorities to exercise powers of government in accordance with the Bonn Constitution, the three occupying powers expressly reserved to themselves (in paragraph 2(i) of the Occupation Statute):

> control of the care and treatment in Germany prisons of persons charged before or sentenced by the courts or tribunals of the occupying powers or occupation authorities; *over the carrying out of sentences imposed on them;* and over questions of amnesty, pardon or release in relation to them. [emphasis supplied]

Quite apart from any questions as to whether the Bonn Constitution could bind the occupation authorities in Germany, it is clear that the occupying powers expressly reserved to themselves all matters

relating to war crimes, including specifically "the carrying out of sentences." However, the petitioners argue that this reserved power relates only to convicted war criminals detained in "German prisons," which they would interpret to mean prisons controlled by German authorities—rather than prisons controlled by American authorities. This argument is frivolous. The reference in the Occupation Statute to "German prisons" clearly means prisons located in Germany; obviously, German law could not possibly apply to persons detained in prisons located outside of Germany. This is the interpretation which the State Department places upon those words. *Factor* v. *Laubenheimer,* 290 U. S. 276, 295.[11]

Finally, the petitioners contend that the tribunals which tried them lacked or lost jurisdiction because those tribunals refused to recognize the defense of superior orders. That is, these petitioners contend that they cannot be punished for the atrocities which they committed so long as they did what they did in response to an order from a higher official. Under such a defense, of course, no Ger-

[11] Furthermore, the Charter of the Allied High Commission adopted by agreement of the United States, United Kingdom and France on June 20, 1949, two months after the Occupation Statute was approved by those Governments, shows clearly that the custody and execution of sentence upon war criminals was regarded by those Governments as a matter reserved to the occupation authorities. It is specifically stated therein that "Each High Commissioner shall be responsible to his Government . . . for the matters in fields reserved to occupation authorities listed below [which include] the disposition of war criminals." 21 State Dept. Bull. 25, 28.

man could ever be held responsible for the thousands of murders committed in the concentration camps supervised by Pohl and in which Schmidt and Schallermair labored, or by the Einsatzgruppen, or extermination squads, led by Ohlendorf, Braune, Naumann and Blobel.

To prevent any such travesty on justice, the Governments of the United States, Soviet Union, France and the United Kingdom provided in the London Agreement and Charter of the International Tribunal of August 8, 1945,[12] that

> The fact that the defendant acted pursuant to order of his government or of a superior shall not free him from responsibility but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Similarly, Article II 4(b) of Control Council Law No. 10, (*infra*, p. 32) provides that

> The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.

Thus, by international agreement between the Allied governments, it was determined that the defense of superior orders would not be recognized in war crimes trials. Consistent with this inter-

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[12] 13 State Dept. Bull. 223, 224. This agreement, and the principle which it stated, was subscribed to by 19 additional nations.

national agreement, the orders providing for the trial of war crimes by American military commissions likewise provided that superior orders should not constitute a defense but might be considered in mitigation.

The petitioners contend that the international decision to refuse to allow the defense of superior orders so violated the provision of the United States Constitution, Article I, Section 9, that "No * * * ex post facto Law shall be passed," as to render invalid the proceedings of the tribunals which tried them (Pet. 16, 29-31). We pass over, without conceding, the question of whether the so-called defense of superior orders was ever accepted as justification for the commission of acts which every human being must recognize as evil.[13] The only relevant issue is whether the refusal to recognize the defense of superior orders, even if such refusal were retroactive as the petitioners contend, gives rise to a jurisdictional issue which may be determined in habeas corpus proceedings. Certainly no decision of this Court suggests that such a contention constitutes a matter going to the jurisdiction of a military tribunal. Moreover, the ex post facto clause of the Constitution applies in terms only to criminal statutes, *Calder* v. *Bull,* 3 Dallas 386, and there is no more reason for applying it to the President's power to enter into international

[13] See, for example, the decision of the German Supreme Court in 1921, in the *Llandovery Castle* case, reprinted in 16 American Journal of International Law (1922) 708, 721-722.

agreements with our military allies than to judicial decisions. *Ross* v. *Oregon,* 227 U. S. 150. Also, since the ex post facto clause has "no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country," *Neely* v. *Henkel,* 180 U.S. 109, 122, it has no relation to offenses against the law of nations. Most important of all, the decision of the Allied Powers not to recognize the defense of superior orders in war crimes cases in Germany is no more reviewable by the domestic courts of any one of the allied countries than was their decision to establish the International Military Tribunals which sat in Nurnberg and Tokyo. *Hirota* v. *MacArthur,* 338 U. S. 197.

In brief, every issue as to which the petitioners seek review in habeas corpus proceedings has been determined by this Court to be unreviewable in habeas corpus, or has been conclusively determined by agreement between the governments which waged war against Germany. Thus, even if the District Court possessed jurisdiction to consider the petitions for writs of habeas corpus, the exercise of that jurisdiction would have been futile.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

ROBERT W. GINNANE,
Special Assistant to the Attorney General.

APRIL 1951.

APPENDIX A

CONTROL COUNCIL

Law No. 10

PUNISHMENT OF PERSONS GUILTY OF WAR CRIMES, CRIMES AGAINST PEACE AND AGAINST HUMANITY

In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal, the Control Council enacts as follows:

Article I

The Moscow Declaration of 30 October 1943 "Concerning Responsibility of Hitlerites for Committed Atrocities" and the London Agreement of 8 August 1945 "Concerning Prosecution and Punishment of Major War Criminals of the European Axis" are made integral parts of this Law. Adherence to the provisions of the London Agreement by any of the United Nations, as provided for in Article V of that Agreement, shall not entitle such Nation to participate or interfere in the operation of this Law within the Control Council area of authority in Germany.

Article II

1. Each of the following acts is recognized as a crime:

(a) *Crimes against Peace.* Initiation of invasions of other countries and wars of aggression

in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) *War Crimes.* Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

(c) *Crimes against Humanity.* Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions, on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

(d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime

or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.

3. Any persons found guilty of any of the crimes above mentioned may upon conviction be punished as shall be determined by the tribunal to be just. Such punishment may consist of one or more of the following:

(a) Death.

(b) Imprisonment for life or a term of years, with or without hard labor.

(c) Fine, and imprisonment with or without hard labour, in lieu thereof.

(d) Forfeiture of property.

(e) Restitution of property wrongfully acquired.

(f) Deprivation of some or all civil rights.

Any property declared to be forfeited or the restitution of which is ordered by the Tribunal shall be delivered to the Control Council for Germany, which shall decide on its disposal.

4. (a) The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.

(b) The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.

5. In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.

Article III

1. Each occupying authority, within its Zone of Occupation,

(a) shall have the right to cause persons within such Zone suspected of having committed a crime, including those charged with crime by one of the United Nations, to be arrested and shall take under control the property, real and personal, owned or controlled by the said persons, pending decisions as to its eventual disposition.

(b) shall report to the Legal Directorate the name of all suspected criminals, the reasons for and the places of their detention, if they are detained, and the names and location of witnesses.

(c) shall take appropriate measures to see that witnesses and evidence will be available when required.

(d) shall have the right to cause all persons so arrested and charged, and not delivered to another authority as herein provided, or released, to be brought to trial before an appropriate tribunal.

Such tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German Court, if authorized by the occupying authorities.

2. The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945.

3. Persons wanted for trial by an International Military Tribunal will not be tried without the consent of the Committee of Chief Prosecutors. Each Zone Commander will deliver such persons who are within his Zone to that committee upon request and will make witnesses and evidence available to it.

4. Persons known to be wanted for trial in another Zone or outside Germany will not be tried prior to decision under Article IV unless the fact of their apprehension has been reported in accordance with Section 1(b) of this Article, three months have elapsed thereafter, and no request for delivery of the type contemplated by Article IV has been received by the Zone Commander concerned.

5. The execution of death sentences may be deferred by not to exceed one month after the sentence has become final when the Zone Commander

concerned has reason to believe that the testimony of those under sentence would be of value in the investigation and trial of crimes within or without his zone.

6. Each Zone Commander will cause such effect to be given to the judgments of courts of competent jurisdiction, with respect to the property taken under his control pursuant thereto, as he may deem proper in the interest of justice.

Article IV

1. When any person in a Zone in Germany is alleged to have committed a crime, as defined in Article II, in a country other than Germany or in another Zone, the government of that nation or the Commander of the latter Zone, as the case may be, may request the Commander of the Zone which the person is located for his arrest and delivery for trial to the country or Zone in which the crime was committed. Such request for delivery shall be granted by the Commander receiving it unless he believes such person is wanted for trial or as a witness by an International Military Tribunal, or in Germany, or in a nation other than the one making the request, or the Commander is not satisfied that delivery should be made, in any of which cases he shall have the right to forward the said request to the Legal Directorate of the Allied Control Authority. A similar procedure shall apply to witnesses, material exhibits and other forms of evidence.

2. The Legal Directorate shall consider all requests referred to it, and shall determine the same in accordance with the following principles, its

determination to be communicated to the Zone Commander.

(a) A person wanted for trial or as a witness by an International Military Tribunal shall not be delivered for trial or required to give evidence outside Germany, as the case may be, except upon approval by the Committee of Chief Prosecutors acting under the London Agreement of 8 August 1945.

(b) A person wanted for trial by several authorities (other than an International Military Tribunal) shall be disposed of in accordance with the following priorities:

(1) If wanted for trial in the Zone [in] which he is, he should not be delivered unless arrangements are made for his return after trial elsewhere;

(2) If wanted for trial in a Zone other than that in which he is, he should be delivered to that Zone in preference to delivery outside Germany unless arrangements are made for his return to that Zone after trial elsewhere;

(3) If wanted for trial outside Germany by two or more of the United Nations, of one of which he is a citizen, that one should have priority;

(4) If wanted for trial outside Germany by several countries, not all of which are United Nations, United Nations should have priority;

(5) If wanted for trial outside Germany by two or more of the United Nations, then, subject to Article IV 2 (b) (3) above, that which has the most serious charges against him, which are moreover supported by evidence, should have priority.

Article V

The delivery, under Article IV of this law, of persons for trial shall be made on demands of the Governments or Zone Commanders in such a manner that the delivery of criminals to one jurisdiction will not become the means of defeating or unnecessarily delaying the carrying out of justice in another place. If within six months the delivered person has not been convicted by the Court of the Zone or country to which he has been delivered, then such person shall be returned upon demand of the Commander of the Zone where the person was located prior to delivery.

Done at Berlin, 20 December 1945.

(Signed) Joseph T. McNarney
JOSEPH T. MCNARNEY
General, U. S. Army

(Signed) Bernard L. Montgomery
BERNARD L. MONTGOMERY
Field Marshal

(Signed) Louis Koeltz, General d'Corps de Armee
for PEIRRE KOENIG
General d'Armee

(Signed) Georgi Zhukov
GEORGI ZHUKOV
Marshall of the Soviet Union

APPENDIX B

MILITARY GOVERNMENT—GERMANY, UNITED STATES ZONE

Ordinance No. 7

Organization and Powers of Certain Military Tribunals

Article I

The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offenses recognized as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes. Nothing herein shall prejudice the jurisdiction or the powers of other courts established or which may be established for the trial of any such offenses.

Article II

a) Pursuant to the powers of the Military Governor for the United States Zone of Occupation within Germany and further pursuant to the powers conferred upon the Zone Commander by Control Council Law No. 10 and Articles 10 and 11 of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 certain tribunals to be known as "Military Tribunals" shall be established hereunder.

b) Each such tribunal shall consist of three or more members to be designated by the Military Governor. One alternate member may be designated to any tribunal if deemed advisable by the Military Governor. Except as provided in subsection (c) of this Article, all members and alternates

shall be lawyers who have been admitted to practice, for at least five years, in the highest courts of one of the United States or its territories or of the District of Columbia, or who have been admitted to practice in the United States Supreme Court.

c) The Military Governor may in his discretion enter into an agreement with one or more other zone commanders of the member nations of the Allied Control Authority providing for the joint trial of any case or cases. In such cases the tribunals shall consist of three or more members as may be provided in the agreement. In such cases the tribunals may include properly qualified lawyers designated by the other member nations.

d) The Military Governor shall designate one of the members of the tribunal to serve as the presiding judge.

e) Neither the tribunals nor the members of the tribunals or the alternates may be challenged by the prosecution or by the defendants or their counsel.

f) In case of illness of any member of a tribunal or his incapacity for some other reason, the alternate, if one has been designated, shall take his place as a member in the pending trial. Members may be replaced for reasons of health or for other good reasons, except that no replacement of a member may take place, during a trial, other than by the alternate. If no alternate has been designated, the trial shall be continued to conclusion by the remaining members.

g) The presence of three members of the tribunal or of two members when authorized pursuant to subsection (f) *supra* shall be necessary to constitute a quorum. In the case of tribunals

designated under (c) above the agreement shall determine the requirements for a quorum.

h) Decisions and judgments, including convictions and sentences, shall be by majority vote of the members. If the votes of the members are equally divided, the presiding member shall declare a mistrial.

Article III

a) Charges against persons to be tried in the tribunals established hereunder shall originate in the Office of the Chief of Counsel for War Crimes, appointed by the Military Governor pursuant to Paragraph 3 of Executive Order Numbered 9679 of the President of the United States dated 16 January 1946. The Chief of Counsel for War Crimes shall determine the persons to be tried by the tribunals and he or his designated representative shall file the indictments with the Secretary General of the tribunals (See Article XIV, *infra*) and shall conduct the prosecution.

b) The Chief of Counsel for War Crimes, when in his judgment it is advisable, may invite one or more United Nations to designate representatives to participate in the prosecution of any case.

Article IV

In order to ensure fair trial for the defendants, the following procedure shall be followed:

a) A defendant shall be furnished, at a reasonable time before his trial, a copy of the indictment and of all documents lodged with the indictment, translated into a language which he understands. The indictment shall state the charges plainly, concisely and with sufficient particulars to inform defendant of the offenses charged.

b) The trial shall be conducted in, or translated into, a language which the defendant understands.

c) A defendant shall have the right to be represented by counsel of his own selection, provided such counsel shall be a person qualified under existing regulations to conduct cases before the courts of defendant's country, or any other person who may be specially authorized by the tribunal. The tribunal shall appoint qualified counsel to represent a defendant who is not represented by counsel of his own selection.

d) Every defendant shall be entitled to be present at his trial except that a defendant may be proceeded against during temporary absences if in the opinion of the tribunal defendant's interests will not thereby be impaired, and except further as provided in Article VI (c). The tribunal may also proceed in the absence of any defendant who has applied for and has been granted permission to be absent.

e) A defendant shall have the right through his counsel to present evidence at the trial in support of his defense, and to cross-examine any witness called by the prosecution.

f) A defendant may apply in writing to the tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located and shall also state the facts to be proved by the witness or the document and the relevancy of such facts to the defense. If the tribunal grants the application, the defendant shall be given such aid in obtaining production of evidence as the tribunal may order.

Article V

The tribunals shall have the power—

a) to summon witnesses to the trial, to require their attendance and testimony and to put questions to them;

b) to interrogate any defendant who takes the stand to testify in his own behalf, or who is called to testify regarding another defendant;

c) to require the production of documents and other evidentiary material;

d) to administer oaths;

e) to appoint officers for the carrying out of any task designated by the tribunals including the taking of evidence on commission;

f) to adopt rules of procedure not inconsistent with this Ordinance. Such rules shall be adopted, and from time to time as necessary, revised by the members of the tribunals or by the committee of presiding judges as provided in Article XIII.

Article VI

The tribunals shall—

a) confine the trial strictly to an expeditious hearing of the issues raised by the charges;

b) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever;

c) deal summarily with any contumacy, imposing appropriate punishment, including the exclusion of any defendant or his counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Article VII

The tribunals shall not be bound by technical rules of evidence. They shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which they deem to have probative value. Without limiting the foregoing general rules, the following shall be deemed admissible if they appear to the tribunal to contain information of probative value relating to the charges: affidavits, depositions, interrogations, and other statements, diaries, letters, the records, findings, statements and judgments of the military tribunals and the reviewing and confirming authorities of any of the United Nations, and copies of any document or other secondary evidence of the contents of any document, if the original is not readily available or cannot be produced without delay. The tribunal shall afford the opposing party such opportunity to question the authenticity or probative value of such evidence as in the opinion of the tribunal the ends of justice require.

Article VIII

The tribunals may require that they be informed of the nature of any evidence before it is offered so that they may rule upon the relevance thereof.

Article IX

The tribunals shall not require proof of facts of common knowledge but shall take judicial notice thereof. They shall also take judicial notice of official governmental documents and reports of any of the United Nations, including the acts

and documents of the committees set up in the various Allied countries for the investigation of war crimes, and the records and findings of military or other tribunals of any of the United Nations.

Article X

The determinations of the International Military Tribunal in the judgments in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as the participation therein or knowledge thereof by any particular person may be concerned. Statements of the International Military Tribunal in the judgment in Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary.

Article XI

The proceedings at the trial shall take the following course:

a) The tribunal shall inquire of each defendant whether he has received and had an opportunity to read the indictment against him and whether he pleads "guilty" or "not guilty".

b) The prosecution may make an opening statement.

c) The prosecution shall produce its evidence subject to the cross examination of its witnesses.

d) The defense may make an opening statement.

e) The defense shall produce its evidence subject to the cross examination of its witnesses.

f) Such rebutting evidence as may be held by the tribunal to be material may be produced by either the prosecution or the defense.

g) The defense shall address the court.

h) The prosecution shall addresss the court.

i) Each defendant may make a statement to the tribunal.

j) The tribunal shall deliver judgment and pronounce sentence.

Article XII

A Central Secretariat to assist the tribunals to be appointed hereunder shall be established as soon as practicable. The main office of the Secretariat shall be located in Nuernberg. The Secretariat shall consist of a Secretary General and such assistant secretaries, military officers, clerks, interpreters and other personnel as may be necessary.

Article XIII

The Secretary General shall be appointed by the Military Governor and shall organize and direct the work of the Secretariat. He shall be subject to the supervision of the members of the tribunals, except that when at least three tribunals shall be functioning, the presiding judges of the several tribunals may form the supervisory committee.

Article XIV

The Secretariat shall—

a) Be responsible for the administrative and supply needs of the Secretariat and of the several tribunals.

b) Receive all documents addressed to tribunals.

c) Prepare and recommend uniform rules of procedure, not inconsistent with the provisions of this Ordinance.

d) Secure such information for the tribunals as may be needed for the approval or appointment of defense counsel.

e) Serve as liaison between the prosecution and defense counsel.

f) Arrange for aid to be given defendants and the prosecution in obtaining production of witnesses or evidence as authorized by the tribunals.

g) Be responsible for the preparation of the records of the proceedings before the tribunals.

h) Provide the necessary clerical, reporting and interpretative services to the tribunals and its members, and perform such other duties as may be required for the efficient conduct of the proceedings before the tribunals, or as may be requested by any of the tribunals.

Article XV

The judgments of the tribunals as to the guilt or the innocence of any defendant shall give the reasons on which they are based and shall be final and not subject to review. The sentences imposed may be subject to review as provided in Article XVII, *infra*.

Article XVI

The tribunal shall have the right to impose upon the defendant, upon conviction, such punishment as shall be determined by the tribunal to be just, which may consist of one or more of the penalties provided in Article II, Section 3 of Control Council Law No. 10.

Article XVII

a) Except as provided in (b) *infra,* the record of each case shall be forwarded to the Military Governor who shall have the power to mitigate, reduce or otherwise alter the sentence imposed by the tribunal, but may not increase the severity thereof.

b) in cases tried before tribunals authorized by Article II (c) the sentence shall be reviewed jointly by the zone commanders of the nations involved, who may mitigate, reduce or otherwise alter the sentence, by majority vote, but may not increase the severity thereof. If only two nations are represented, the sentence may be altered only by the consent of both zone commanders.

Article XVIII

No sentence of death shall be carried into execution unless and until confirmed in writing by the Military Governor. In accordance with Article III, Section 5 of Law No. 10, execution of the death sentence may be deferred by not to exceed one month after such confirmation if there is reason to believe that the testimony of the convicted person may be of value in the investigation and trial of other crimes.

Article XIX

Upon the pronouncement of a death sentence by a tribunal established thereunder and pending confirmation thereof, the condemned will be remanded to the prison or place where he was confined and there be segregated from the other inmates, or be transferred to a more appropriate place of confinement.

Article XX

Upon the confirmation of a sentence of death the Military Governor will issue the necessary orders for carrying out the execution.

Article XXI

Where sentence of confinement for a term of years has been imposed the condemned shall be confined in the manner directed by the tribunal imposing sentence. The place of confinement may be changed from time to time by the Military Governor.

Article XXII

Any property declared to be forfeited or the restitution of which is ordered by a tribunal shall be delivered to the Military Governor, for disposal in accordance with Control Council Law No. 10, Article II (3).

Article XXIII

Any of the duties and functions of the Military Governor provided for herein may be delegated to the Deputy Military Governor. Any of the duties and functions of the Zone Commander provided for herein may be exercised by and in the name of the Military Governor and may be delegated to the Deputy Military Governor.

This Ordinance becomes effective 18 October 1946.

BY ORDER OF MILITARY GOVERNMENT.

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